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Supreme Court of the United States

CLIFFORD B. MEACHAM *et al.*,

Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Two terms ago, this Court granted certiorari in this case to decide whether the "reasonable factors other than age" (RFOA) defense in the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1), is an affirmative defense or an element of the plaintiff's case-in-chief. *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008). The Court held that the RFOA provision establishes a traditional affirmative defense and "remanded for further proceedings consistent with [its] opinion." *Id.* at 2398. On remand, the district court reinstated the jury verdict in plaintiffs' favor on the ground that defendants had waived the RFOA defense by failing to press it at trial. The Second Circuit reversed, holding that although this Court's opinion had not discussed whether defendants had waived the defense, the Court had implicitly decided the issue in defendants' favor. The question presented is:

Whether the court of appeals misconstrued this Court's decision and mandate, and erred in reversing the district court's reinstatement of the jury verdict.

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs in this case include Raymond Adams, Wallace Arnold, Deborah Bush, William Chabot, Allen Cromer, Thedrick Eighmie, Belinda Gundersen (as appointed representative of her late husband, Paul Gundersen), Clifford Levendusky, Clifford Meacham, Bruce Palmatier, Neil Pareene, James Quinn, Margaret Reynheer (as appointed representative of her late husband, William Reynheer), John Stannard, Allen Sweet, David Townsend, and Carl Woodman.

The defendants include Knolls Atomic Power Laboratory, Lockheed Martin Corp., and John J. Freeh.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Clifford B. Meacham *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit most relevant to this petition (Pet. App. 1a-5a and 35a-39a) are unpublished. Prior decisions of the court of appeals are published at 461 F.3d 134 and 381 F.3d 61. The magistrate judge's order (Pet. App. 6a-34a) is published at 627 F. Supp. 2d. 72.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2009. Pet. App. 1a. The court denied plaintiffs' and defendants' timely petitions for rehearing and rehearing en banc on February 17, 2010 and February 23, 2010 respectively. Pet. App. 62a-65a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(f), provides in relevant part:

> It shall not be unlawful for an employer, employment agency, or labor organization–
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section * * * where the differentiation is

based on reasonable factors other than age * * * *.

Rule 50 of the Federal Rules of Civil Procedure provides in relevant part:

> **(a) Judgment as a Matter of Law.**
>
> > **(1) In General.** If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
> >
> > > **(A)** resolve the issue against the party; and
> > >
> > > **(B)** grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
> >
> > **(2) Motion.** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.
>
> **(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have

submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment–or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged–the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law. * * * *

STATEMENT

In 2008, this Court granted certiorari in this case to decide whether the "reasonable factors other than age" (RFOA) provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(f)(1), creates an affirmative defense. *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008). The Court held that the RFOA provision establishes a traditional affirmative defense upon which the defendant bears the burden of proof. *See id.* at 2398. The Court then vacated the decision below and "remanded for further proceedings consistent with [its] opinion." *Id.* at 2407. On remand, plaintiffs argued that because RFOA is an affirmative defense, defendants' failure to press the defense at trial precluded them from raising it for the first time on appeal in seeking to overturn the jury's verdict in plaintiffs' favor. The Second Circuit remanded the case to the district court and ordered it to decide that question, among others.

On remand, the district court found as a matter of fact that although defendants initially pled RFOA as a defense in their answer, they later knowingly abandoned the defense before trial, apparently as a matter of strategy. It therefore denied defendants' motion for judgment as a matter of law and reinstated the original jury verdict in plaintiffs' favor. On appeal, a new panel held that this Court's mandate barred consideration of plaintiffs' waiver argument. Although this Court's opinion did not mention the waiver issue, the panel construed the decision to implicitly reject any claim that defendants had waived the defense. The panel then ordered a new trial to allow defendants to assert the

RFOA defense the district court found, and the panel did not dispute, defendants knowingly waived at the original trial ten years earlier.

Factual Background

This age discrimination case has followed a long and tortured path, involving two trips to this Court and multiple, conflicting decisions by different panels of the Second Circuit.

As described in greater detail in this Court's most recent decision, *see* 128 S.Ct. at 2398, in 1996, defendants implemented an involuntary reduction in force. They selected workers for termination based on several factors, including the worker's "criticality" and "flexibility." Pet. App. 22a. The heavy and unaudited reliance on these highly subjective factors had the effect of singling out older workers for termination. When KAPL later terminated thirty-one employees, all but one were above the age of forty. *See* 128 S.Ct. at 2398. A statistical expert later testified that the likelihood of this deeply skewed result occurring by chance was one in 348,000. *Id.* at 2399 n.4.

The Trial (1997-2000)

In January 1997, plaintiffs sued KAPL, alleging disparate treatment and disparate impact under the ADEA. 128 S.Ct at 2398. In their answer, defendants asserted several affirmative defenses, including that they acted on the basis of "reasonable factors other than age." Pet. App. 15a. Subsequently, defendants abandoned that defense, along with several others pled in their answer, as the issues in the case narrowed for trial.

Thus, when defendants moved for summary judgment, they made no mention of the RFOA defense, but focused instead on other arguments, including an assertion that disparate impact liability was unavailable under the ADEA, and that plaintiffs failed to establish the elements of a disparate impact claim in any event. *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 66 (2d Cir. 2004).

Nor did defendants assert any RFOA defense at trial. At the close of plaintiffs' evidence, defendants moved for a directed verdict under Fed. R. Civ. P. 50(a), but made no reference to the RFOA defense. Pet. App. 16a. Likewise, defendants did not request a jury instruction on the RFOA defense, although they requested instructions on other affirmative defenses. Pet. App. 16a. And when the district court issued its jury charge and special verdict form containing no mention of the defense, defendants did not object. Pet. App. 16a-17a.

After deliberation, the jury found that plaintiffs had proven a disparate impact violation and that the violation was willful. *Meacham*, 128 S.Ct. at 2399; 381 F.3d at 62. Defendants then renewed their Rule 50 motion, but again did not mention the RFOA provision. Pet. App. 16a, 52a.

Approximately one year later, the district court denied defendants' motion and upheld the jury's verdict. Pet. App. 8a.

The First Appeal (2002-2004)

Defendants appealed, arguing that the ADEA did not provide for disparate impact claims, and that plaintiffs had failed to prove the elements of a disparate impact claim in any event. Defendants did

not, however, argue that they were entitled to judgment as a matter of law under the RFOA provision. Pet. App. 17a.

The appeal remained pending before Judges Jacobs, McLaughlin, and Pooler, for two and a half years. Eventually, the panel unanimously affirmed. *Meacham*, 381 F.3d at 56. The court reaffirmed prior circuit precedent recognizing a disparate impact cause of action under the ADEA, and held that plaintiffs had established all the elements of a disparate impact claim. *Id.* at 62. The court also upheld the jury's finding of a willful violation, concluding that a reasonable jury could have found that defendants' actions "evinced a desire not to know that the overwhelming – and overwhelmingly disparate – impact of the [layoffs] was on older workers." *Id.* at 77.

The First Petition For Certiorari (2004)

Defendants petitioned this Court for a writ of certiorari. Among other things, the petition challenged the Second Circuit's recognition of a disparate impact cause of action under the ADEA, a question the Court had recently granted certiorari to decide in *Smith v. City of Jackson*, 544 U.S. 228 (2005). The Court held the petition pending its decision in *City of Jackson*, which subsequently affirmed the existence of an ADEA disparate impact cause of action. *Id.* at 232. In the course of its decision, the Court noted that the ADEA provides a defense for employers who can show that their otherwise unlawful conduct was based on "reasonable factors other than age." *Id.* at 233.

The Court then granted defendants' petition, vacated the judgment, and remanded for reconsideration in light of *City of Jackson*. *Knolls Atomic Power Lab. v. Meacham*, 544 U.S. 957 (2005).

The First Remand To The Second Circuit (2005-2006)

On remand, defendants argued for the first time since their answer that they were entitled to prevail under the RFOA provision. Pet. App. 18a. Plaintiffs objected that defendants had waived any right to raise an RFOA defense on appeal because they had failed to press it at trial. Remand Brief of Plaintiffs-Appellees at 4-5, *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134 (2d Cir. 2006) (No. 09-2037).

In a divided opinion, the Second Circuit reversed and ordered entry of judgment as a matter of law in defendants' favor. Writing for himself and Judge McLaughlin, Judge Jacobs concluded that the RFOA provision was not an affirmative defense, but rather an element of the plaintiffs' case-in-chief upon which the plaintiff bears the burden of persuasion. *Meacham*, 461 F.3d at 141. Although it acknowledged that defendants' practices were seriously flawed, the majority concluded that plaintiffs had failed to meet their burden of showing that defendants' practices were unreasonable. *Id.* at 146.

Judge Pooler dissented, interpreting the RFOA provision to establish a traditional affirmative defense. And because the defendants had failed to request a jury charge on the defense at trial, she concluded, they had waived any right to rely upon it on appeal. *Id.* at 152.

The Second Petition For Certiorari (2007)

Plaintiffs then petitioned for certiorari on two questions. Plaintiffs first sought review of the Second Circuit's holding that an employee alleging disparate impact under the ADEA bears the burden of persuasion on the RFOA defense. Petition for Writ of Certiorari at i, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505). Second, plaintiffs asked the Court to decide whether the defendants' "practice of conferring broad discretionary authority on individual managers" to select workers for termination constituted a "reasonable factor other than age" as a matter of law. *Id.* This Court granted certiorari "limited to Question 1 presented by the petition." *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 1118 (2008) (mem.).

In addition to briefing that question, both parties urged this Court to go further and apply its holding to the facts of this case. Plaintiffs acknowledged that "[u]nder the Court's normal practice, the judgment below would be vacated and the case remanded to the Second Circuit for proceedings consistent with the Court's resolution of the burden of proof question." Brief for Petitioners at 51, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505). However, plaintiffs argued that "a remand is not required in this case" because "respondents have forfeited any right to assert the RFOA provision as an affirmative defense" by failing to raise it at trial. *Id.* at 51-52. Defendants, on the other hand, argued that even if this Court held that the RFOA was an affirmative defense, it should nevertheless find that defendants had sustained

their burden of proving the reasonableness of their conduct. Brief for Respondents at 49-56, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505).

This Court accepted neither invitation and, instead, simply decided the question upon which it had granted certiorari. The Court observed that "[g]iven how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such), it is no surprise that we have already spoken of the BFOQ and RFOA provisions as being among the ADEA's 'five affirmative defenses.'" *Meacham*, 128 S.Ct. at 2400 (citation omitted). "After looking at the statutory text," the Court remarked, "most lawyers would accept that characterization as a matter of course." *Id.*

The Court expressly declined defendants' invitation to decide whether they had sustained their burden of proving the defense. The Court acknowledged that the Second Circuit "showed no hesitation in finding that Knolls prevailed on the RFOA defense, though the court expressed its conclusion in terms of Meacham's failure to meet the burden of persuasion." *Id.* at 2406. But "[w]hether the outcome should be any different when the burden is properly placed on the employer," the Court concluded, "is best left to th[e] [circuit] court in the first instance." *Id.* at 2406-07.

Likewise, the Court did not address plaintiffs' waiver argument, but instead remanded the case to the Second Circuit "for further proceedings consistent with this opinion." *Id.* at 2407.

The Second Remand To The Second Circuit (2008)

On remand, the court of appeals directed the parties to submit supplemental briefs. Among other things, the court ordered the parties to address whether "the employer waive[d] the affirmative defense of a reasonable factor other than age by not requesting a charge on that defense and/or not objecting to the court's charge?" and whether "defendants [should] prevail as a matter of law on their reasonable factor other than age defense." Pet. App. 39a.

In their letter brief, defendants argued that they had preserved their RFOA defense at trial, but never contested plaintiffs' assertion that the waiver question had been left open by this Court for consideration on remand. *See* Pet. App. 46a-47a; Pet. App. 51a n.1.

Six months later, the panel issued a summary order remanding the case to the district court with instructions to decide, among other things, "[d]id the employer waive the RFOA affirmative defense by its conduct at the district court" and "[i]f so, was any such waiver excused as 'the result of conflicting statements in our case law, for which [the employer] should not be penalized?" Pet. App. 37a (quoting *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 485 (2d Cir. 2008)).

The Remand to District Court (2009)

In the district court, defendants again argued that they had not waived their RFOA defense, without suggesting that this Court's mandate had precluded the Second Circuit or the district court

from considering that question on remand. Pet. App. 20a-29a.[1] After extensive briefing and argument, and drawing on its direct participation in the original trial, the district court issued an opinion finding that defendants had knowingly and intentionally waived their RFOA defense, that this waiver could not be excused, and that as a result, the jury verdict should be reinstated. Pet. App. 13a-20a, 29a-33a.

First, the court found as a factual matter that at the time of trial, defendants were aware of their right to assert the RFOA defense and intentionally relinquished the defense prior to trial, apparently as a matter of trial strategy. Pet. App. 18a. The court found that there was "no dispute that having asserted the RFOA defense in their answer, defendants never again asserted that defense throughout the trial, in their appeal, in their petition for certiorari, or at any time before" this Court's remand for reconsideration in light of *City of Jackson*. Pet. App. 16a.[2] The decision to abandon the RFOA defense, the court found, was "fully intentional." Pet. App. 29a, 18a. Although, in retrospect, that choice may have proven unwise, the district court found that at the time of trial, "it

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[1] To the contrary, when asked directly by the district court at oral argument whether this Court had made any finding on waiver, defendants' counsel answered "[t]hey made no finding on that, none at all." C.A. J.A. A-5196 (transcript of Mar. 26, 2009 argument).

[2] The district court rejected defendants' contention that although they did not mention the RFOA provision explicitly, they "pressed and preserved the defense in functionally equivalent terms." Pet. App. 20a.

constituted a rational choice given the competing considerations." Pet. App. 19a.

The court further held that defendants' waiver could not be excused on the basis of any "conflicting statements in [the Second Circuit's] case law, for which [defendants] should not be penalized." Pet. App. 29a. The court explained that "[d]efendants have cited no decisions in the Second Circuit prior to the trial which could reasonably be construed as in conflict over the RFOA exception or the burden of proof on that defense." Pet. App. 30a. "Absent demonstration of such conflicting statements," the court held, "no basis is presented to excuse defendants' waiver." Pet. App. 30a. "The fact that the issue was recognized by a party only after trial or that a post-trial appellate court ruling may have alerted a party to an additional argument cannot excuse silence on that issue at trial lest no judgment ever be final." Pet. App. 32a.

The Second Appeal (2009)

Defendants again appealed and seven months later, a new panel – consisting of Chief Judge Jacobs, the author of the opinion this Court reversed, and two new judges[3] – overturned the district court's ruling, concluding that the prior panel's remand order was in conflict with this Court's mandate.[4]

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[3] The prior panel had ordered that any further appeals in the case should be "assigned to a new panel in the ordinary course." Pet. App. 37a.

[4] When defendants asserted on appeal that this Court's mandate precluded consideration of the waiver question, plaintiffs argued that this contention was waived because

The new panel recognized that its predecessor had ordered the district court to decide whether defendants had waived their RFOA defense. However, it concluded that the inquiry was precluded by this Court's decision, which it read "as impliedly but necessarily rejecting plaintiffs' waiver argument." Pet. App. 4a. The panel acknowledged that the Court's opinion said nothing explicit about waiver. Furthermore, it did not give any reason *why* this Court would have rejected plaintiffs' waiver argument, nor did it question the district court's factual finding that the defense had in fact been waived.

Nonetheless, the panel concluded that this Court must have decided the question in defendants' favor, even if only implicitly. Pet. App. 4a. It found support for that conclusion in this Court's statement that "the only thing at stake . . . is the gap between production and persuasion." Pet. App. 3a (quoting *Meacham*, 128 S.Ct. at 2406). And it pointed as well to the Court's observations that "the [Second Circuit] court . . . showed no hesitation in finding that Knolls prevailed on the RFOA defense" and that "whether the outcome should be any different when the burden is properly placed . . . should be left to that court in the first instance." Pet. App. 3a (quoting 128 S.Ct. at 2406-07). The panel further observed that "waiver principles are analytically antecedent to an analysis on the merits," and that

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defendants had not raised it earlier in their supplemental briefing to the initial panel or in the district court. Pl. C.A. Br. 19-20. The new panel did not address this contention.

plaintiffs asked the Court to rule on the waiver question in their briefs. Pet. App. 4a.

The panel then decided that "uncertainty and multiple changes in the governing law ha[d] complicated the issues in this case to such an extent that neither party [was] entitled to judgment as a matter of law, either on the merits or on procedural grounds." Pet. App. 4a.[5] The court therefore vacated the district court's decision and remanded the case for further discovery and a new trial on liability. Pet. App. 4a.

The court subsequently denied rehearing, Pet. App. 62a-65a, and this petition followed.

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[5] It is unclear why the panel refered to "neither party" being entitled to judgment as a matter of law, as only defendants were seeking that relief; plaintiffs sought only to have the jury's verdict enforced.

REASONS FOR GRANTING THE PETITION

The district court found, as a matter of fact, that defendants made a knowing and deliberate decision to abandon the RFOA defense they pled in their answer, apparently as a matter of trial strategy. Without questioning the correctness of that finding, the court of appeals nonetheless ordered a new trial, fourteen years after this age discrimination case first arose, to allow defendants an opportunity to litigate that waived defense. The court made no effort to defend this result on the merits. Instead, it laid responsibility for this inexplicable result at the feet of this Court. Although this Court's opinion never mentioned waiver, and remanded the case for "proceedings consistent with this opinion," the panel nonetheless concluded that the Court had implicitly resolved the waiver question in defendants' favor and barred further consideration of the issue by the district court on remand.

That conclusion is wrong and should be corrected. *See, e.g.*, *United States v. Navajo Nation*, 129 S.Ct. 1547 (2009) (reversing court of appeals' misconstruction of the Court's mandate); *Stanton v. Stanton*, 429 U.S. 501 (1977) (per curiam) (vacating lower court judgment based on misconstruction of the Court's mandate); *Perkins v. Standard Oil Co. of Cal.*, 399 U.S. 222 (1970) (per curiam) (same); *Alleghany Corp. v. Breswick & Co.*, 355 U.S. 415 (1958) (per curiam) (same). The court of appeals' decision is an affront to this Court's authority to limit the scope of its own decisions and to assign to the lower courts responsibility for adjudicating other issues that this Court has declined to decide. The decision also inflicts great unfairness on the

plaintiffs, who have been denied any appellate decision on a claim that the district court found to have merit, and will be forced to retry age discrimination claims that are now more than fourteen years old.

Because this intolerable result arises from a decision of this Court, and because only this Court can correct it, the petition should be granted and the judgment below reversed.

I. The Second Circuit Misconstrued This Court's Mandate.

1. By its plain terms, this Court's decision did not resolve whether defendants waived their RFOA defense at trial or preclude the district court from deciding that question on remand.

This Court expressly limited its decision to the question "whether an employer facing a disparate-impact claim and planning to defend on the basis of RFOA must not only produce evidence raising the defense, but also persuade the factfinder of its merit." 128 S.Ct. at 2398. Although both defendants and plaintiffs asked this Court to go further and decide the ultimate disposition of the case in light of its answer to that question, the Court declined to do so. In particular, although plaintiffs raised the waiver argument in their briefs, the Court did not decide (or even mention) the issue in its opinion. Instead, the Court "remanded for further proceedings consistent with this opinion." *Id.* at 2407.

Under this traditional, open-ended mandate "all questions which appear upon the record and have not already been decided are open for consideration." *Mut. Life Ins. Co. v. Hill*, 193 U.S. 551, 554 (1904);

see also, e.g., *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (so construing identically worded mandate); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939) ("While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues."). This includes issues that were pressed before the Court, but not decided. *See, e.g.*, *Mut. Life Ins. Co.*, 193 U.S. at 553-54.

It is not particularly surprising that this Court chose to leave the waiver question to the lower courts. The Court had granted certiorari to resolve a circuit conflict over the general legal question whether the RFOA provision creates an affirmative defense. Whether defendants had waived that defense in this particular case did not implicate that, or any other, circuit split. Defendants also declined to brief the waiver question in any depth, relegating their response to a two-paragraph footnote. *See* Brief for Respondents at 54 n.20, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505). Refusing to decide the waiver question was also consistent with the Court's denial of plaintiffs' second question presented (which asked whether defendants' delegation of discretionary authority to front-line managers to select workers for termination constituted a reasonable factor other than age as a matter of law). Petition for Writ of Certiorari at i, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505); 128 S. Ct. 1118 (2008) (mem.) (granting on first question only). And it coincided with this Court's express refusal to decide in the first instance whether defendants could satisfy their burden of proof under the RFOA provision on the facts of this case. 128 S.Ct. at 2406-07.

At the same time, it would be surprising indeed if the Court had not only decided the case-specific waiver question, but had done so *sub silentio*. It is not this Court's practice to resolve significant arguments without explaining its reasoning. Nor could the Court have reasonably expected the Second Circuit to discern that it had decided the waiver question without comment. In fact, if that was the Court's intention, the initial Second Circuit panel (including Judge Jacobs, who sat on both panels) completely missed it. *See* Pet. App. 36a.

2. The subsequent Second Circuit panel nonetheless concluded that this Court's opinion resolved the waiver question in defendants' favor for three reasons, none of them persuasive.

First, the panel relied on this Court's statement that "the only thing at stake . . . is the gap between production and persuasion." Pet. App. 3a (quoting 128 S.Ct. at 2406). The panel apparently construed this language to imply that this Court had concluded that the only issue left *in the entire case* was whether defendants had met their relevant burden under the RFOA provision, thereby excluding any consideration of waiver. Just why this Court would have reached that conclusion, the panel does not say, and the answer is far from obvious. In fact, the Court plainly was referring only to the stakes involved in its resolution of the general legal question upon which it had granted certiorari. It was explaining that the only thing at stake in its construction of the RFOA provision was the gap between production and persuasion, given that "nobody is saying that even the burden of production should be placed on the plaintiff." 128 S.Ct. at 2406. And it made that

statement in the context of explaining why its decision, although imposing some additional burden on employers, would not have the broad effects feared by defendants and their amici. *Id.* What issues were left for remand in this particular case had no bearing on those broader policy concerns.

Second, the panel pointed to this Court's statement that the Second Circuit previously "showed no hesitation in finding that Knolls prevailed on the RFOA defense" and that "[w]hether the outcome should be any different when the burden is properly placed on the employer is best left to that court in the first instance." Pet. App. 3a (quoting 128 S.Ct. at 2406). The court of appeals read this as precluding consideration of plaintiffs' waiver claim given that waiver is "analytically antecedent to an analysis on the merits." Pet. App. 4a.

Rather than implying a rejection of the waiver argument, this statement simply explains why the Court was declining defendants' invitation to rule on the sufficiency of the evidence under the proper standard in the first instance. *See* Brief for Respondents at i, *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395 (2008) (No. 06-1505) (proposing additional question presented: "Whether the judgment below should be affirmed regardless of who bears the burden."); *id.* at § II (arguing that "The Judgment Below Should Be Affirmed Even If The Employer Bears The Burden Of Persuasion On Reasonableness"). The Court explained that this question would be open on remand, but it did not limit the remand to that question. Instead, the Court issued its usual open-ended mandate that the

proceedings on remand simply be "consistent with [its] opinion." 128 S.Ct. at 2398.

Nor does the fact that waiver may be "analytically antecedent" to the merits mean that this Court must have decided the waiver issue *sub silentio*. "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).[6] Where, as here, the Court simply does not discuss an antecedent question, "the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions *in terms* discussed and decided." *Mut. Life Ins. Co.*, 193 U.S. at 553-54 (emphasis added). "[F]ailure to make explicit mention" of an issue "simply [leaves] the matter open for consideration" on remand *Perkins*, 399 U.S. at 223.

Third, and for the same reasons, it makes no difference that the waiver argument was "squarely presented" to the Court. Pet. App. 4a. "When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested." *Mut. Life Ins. Co.*, 193 U.S. at 553. As a result, "omissions do not constitute a part of a decision and become the law of the case, *nor does a contention of*

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[6] To be sure, this Court sometimes decides antecedent issues in addition to the question upon which it granted certiorari. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (deciding logically antecedent question of class certification); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (deciding standing question). But when the Court addresses such antecedent questions, it does so *explicitly*. *See, e.g.*, *Ortiz*, 527 U.S. at 830-65; *Steel Co.*, 523 U.S. at 102-110.

counsel not responded to." Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 136 (1921) (emphasis added). *See also Chas. Wolff Packing Co. v. Court of Indus. Relations of Kansas*, 267 U.S. 552, 562 (1925) (same).

Accordingly, the Second Circuit's construction of this Court's mandate is in conflict with settled mandate principles and finds no support in the language of the Court's opinion. Nor did the court of appeals offer any explanation as to why this Court would have concluded that defendants had preserved their RFOA defense at trial. As discussed next, the district court's contrary conclusion was plainly correct.

II. The Court Of Appeals' Misconstruction Of The Mandate Led It To Wrongly Set Aside The Jury Verdict And Order A New Trial That Will Add Years To This Already Protracted Age Discrimination Litigation.

If plaintiffs' waiver argument were meritless, the court of appeals' misconstruction of this Court's mandate might not warrant correction. But as explained by the district court – the only court to have considered the argument on the merits – there is no reasonable dispute that having raised RFOA in their answer, defendants subsequently abandoned it, thereby waiving any right to challenge the verdict on the basis of a defense they never presented to the jury at trial. The Second Circuit's refusal to give effect to that waiver – thereby requiring a retrial in an age discrimination case already well into its second decade of litigation – is both wrong and consequential.

1. The deliberate relinquishment of a defense defendants knew was available constitutes a waiver of their right to assert that defense on appeal. *See, e.g., United States v. Broce*, 488 U.S. 563, 571 (1989).

Based on its review of the factual record, and drawing on its own participation at the trial, the district court found that "[t]here can be no doubt . . . that defendants fully knew of the RFOA exemption and that they possessed the right to assert RFOA as a defense." Pet. App. 15a. The district court noted that the statute, by its plain terms, had provided RFOA as an affirmative defense since 1967. Pet. App. 13a. As this Court observed, "after looking at [this] statutory text, most lawyers would accept . . . as a matter of course" that the provision established an affirmative defense. 128 S.Ct. at 2400. Moreover, decisions within the Second Circuit at the time of trial had "recognized the RFOA exemption as a defense available to employers in ADEA cases." Pet. App. 14a (collecting cases). And, of course, defendants demonstrated that they recognized as much when they pled RFOA as a defense in their answer. Pet. App. 15a.

The district court further found that "defendants[] intentionally relinquished their right to assert the RFOA defense." Pet. App. 19a-20a. "There exists no dispute that having asserted the RFOA defense in their answer, defendants never again asserted that defense throughout the trial, in their appeal, in their petition for certiorari, or at any time before *Meacham II*." Pet. App. 16a. Defendants did not raise the defense in their summary judgment papers or in their pretrial memorandum. *Id.* They "remained silent on the RFOA at each critical stage

regarding the jury instructions and the special interrogatories in the verdict form." *Id.* And they failed even to mention RFOA in their motions for judgment as a matter of law under Fed. R. Civ. P. 50(a) and (b). *Id.*

The district court found that these failures were not inadvertent. RFOA was one of several defenses defendants pled in their answer but chose not to pursue at trial. Pet. App. 19a. Although defendants have now claimed that they did not know they could assert the RFOA defense to a disparate impact claim, the district court refused to credit that factual assertion. "There exists no evidence," the court found, "to suggest that defendants were uncertain or confused about the defense at the time of trial." Pet. App. 27a. Instead, "defendants' decision to abandon their RFOA defense appears the product of a rational choice of strategies," the court found. Pet. App. 18a (citation omitted). "It appears that defendants chose to pursue a strategy which minimized their burden of proof and maximized that of plaintiffs." *Id.*

2. Even if defendants had not intentionally abandoned their defense as a matter of trial strategy, their failure to raise the defense at critical junctures of the trial, including most significantly in their Rule 50 motions, forfeited their right to assert it on appeal.[7]

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[7] As the district court explained, forfeiture and waiver differ in that "forfeiture refers to a litigant's failure to make the timely assertion of a right," while "waiver requires demonstration that a party intentionally relinquished a known right." Pet. App. 12a & n.6 (citations omitted). Plaintiffs argued that defendants had both waived and forfeited the RFOA defense, but the district court resolved the case in plaintiffs'

Under Rule 50, absent an "appropriate postverdict motion in the district court," *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404 (2006), an appellate court is "without power to direct the district court to enter judgment contrary to the one it had permitted to stand," *id.* at 400-01 (citation omitted), or to order a new trial pursuant to Rule 50, *id.* at 404.[8] This rule "assure[s] the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment." Fed. R. Civ. P. 50 advisory committee's note to 1991 amdt.

Defendants never asserted an RFOA defense in their Rule 50 motions and, accordingly, may not challenge the jury verdict on that ground now.

3. The district court also rightly rejected defendants' assertion that any waiver or forfeiture should be excused because of uncertainty in the law at the time of trial. Pet. App. 29a-33a.

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favor on waiver grounds without considering plaintiffs' forfeiture argument. Pet. App. 12a n.6.

[8] Even when a defendant files a Rule 50(b) motion, the court of appeals lacks authority to order relief on any ground not asserted in the motion to the district court. *See id.* at 404 (holding that "*the precise subject matter* of a party's Rule 50(a) motion . . . cannot be appealed unless that motion is renewed pursuant to Rule 50(b)") (emphasis added); *id.* at 398 n.2 (defendant in *Unitherm* filed a Rule 50(b) motion but did not raise ground upon which it relied on appeal); *see also, e.g.*, *Ford v. County of Grand Traverse*, 535 F.3d 483, 493 (6th Cir. 2008); *Wallace v. City of San Diego*, 479 F.3d 616, 631 (9th Cir. 2007).

a. In some instances, courts have recognized a narrow exception to the ordinary waiver/forfeiture rules for "defenses which were not known to be available at the time they could first have been made." *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981) (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967)); *see also Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605-606 (4th Cir. 1999); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 706-707 (D.C. Cir. 1996).

Defendants argued in the district court that at the time of trial, they were precluded from raising RFOA as a defense to a disparate impact claim. Under then-current Second Circuit precedent, they argued, their only defense was "business necessity" under the burden-shifting regime of *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989). After surveying circuit caselaw, the district court rightly rejected that assertion. While circuit precedent plainly provided that the "business necessity" defense was *one* way to defend against a disparate impact claim, none of the cases defendants cited held that it was the *only* defense available. Pet. App. 21a n.12. And while the Second Circuit had not squarely held that RFOA was an affirmative defense, that much was obvious on the face of the statutory text, *see Meacham*, 128 S.Ct. at 2400, and implied by circuit precedent, *see, e.g.*, *E.E.O.C. v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1541 (2d Cir. 1996) ("[A]n employer *has a defense* if his policy is based on reasonable factors other than age . . . ." (emphasis added) (internal quotation marks omitted)). At the same time, cases from other circuits had expressly

recognized that the RFOA provision established an affirmative defense. *See Criswell v. W. Airlines, Inc.*, 709 F.2d 544, 552-53 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 (6th Cir. 1975).

b. In any event, even if *some* reasonable defendants might have had grounds for confusion about whether RFOA was an affirmative defense, the district court found as a matter of fact that *these particular defendants* were not confused, but knowingly and intentionally abandoned the defense, apparently as a matter of litigation strategy. Pet. App. 27a ("There exists no evidence to suggest that defendants were uncertain or confused about the defense at the time of trial."). There is no basis to excuse such a waiver simply because it turns out, in retrospect, to have been unwise. *Cf.*, *e.g.*, *Ohler v. United States*, 529 U.S. 753, 757-59 (2000) (prohibiting a litigant who made a tactical decision to introduce incriminating evidence at trial from arguing on appeal that the evidence was inadmissible); *Reed v. Ross*, 468 U.S. 1, 14 (1984) (a litigant "may not make a tactical decision to forgo a procedural opportunity – for instance, an opportunity to object at trial or to raise an issue on appeal – and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy" on collateral review).

c. Finally, defendants' failure to raise an RFOA defense in their Rule 50 motions cannot be excused under any circumstance. In *Unitherm*, this Court recognized that Rule 50 establishes an inflexible rule barring appellate consideration of sufficiency-of-the-evidence claims not presented at

trial. 546 U.S. at 405 (concluding that the court of appeals is "powerless" to entertain such arguments). The Court thus rejected the assertion (advanced by the dissent) that courts may excuse failures to comply with Rule 50 when necessary "to avoid manifestly unjust results in exceptional cases." 546 U.S. at 407 (Stevens, J., dissenting). Consequently, defendants' failure to raise an RFOA defense in their Rule 50 motions left the court of appeals without power to award defendants any relief on the basis of that defense under Rule 50.

III. This Court Should Reverse The Second Circuit's Misconstruction Of Its Mandate And Affirm The District Court's Reinstatement Of The Jury Verdict.

This Court has repeatedly granted certiorari to correct lower courts' misconstruction of its mandates. *See, e.g., United States v. Navajo Nation*, 129 S.Ct. 1547 (2009); *Smith v. Texas*, 550 U.S. 297 (2007); *Yates v. Aiken*, 484 U.S. 211 (1988); *Stanton v. Stanton*, 429 U.S. 501 (1977) (per curiam); *Perkins v. Standard Oil Co. of Cal.*, 399 U.S. 222 (1970) (per curiam); *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969); *Alleghany Corp. v. Breswick & Co.*, 355 U.S. 415 (1958) (per curiam); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939).[9] The Court should do so again in this case.

Ordinarily, that would mean vacating the judgment below and remanding to the Second Circuit

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[9] The Court has sometimes done so summarily and could consider the same course of action here. *See, e.g., Perkins*, 399 U.S. at 223; *Stanton*, 429 U.S. at 503-04; *Alleghany*, 355 U.S. at 416.

to consider the merits of the district court's waiver ruling. But in the extraordinary circumstances of this case, the Court should resolve the waiver question itself, in order to bring this protracted litigation to a final conclusion. *See Yates v. Aiken*, 484 U.S. at 215 (resolving question not addressed below because lower court had misconstrued this Court's mandate in failing to decide the issue). Here, "[t]he factual record is adequate, and would not be improved by a remand to the court of appeals. And the case is decided by a straightforward application of controlling precedent." *Thigpen v. Roberts*, 468 U.S. 27, 32-33 (1984) (footnote omitted). More importantly, deciding that straightforward question would finally bring to an end litigation that has already been pending far too long.[10]

The Second Circuit bears much of the responsibility for this delay. That court took more than two years to decide the initial appeal in this case. After this Court vacated that ruling, the court of appeals took another sixteen months to issue its decision reversing course and awarding judgment to defendants. That decision, this Court subsequently held, was premised on an erroneous interpretation of the statute (an error that required almost two years to correct). On remand, the Second Circuit ordered supplemental briefing and held the case under advisement for six months, before sending it back to the district court to decide, among other things,

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[10] *Cf. Fed. Power Comm'n v. Sunray DX Oil Co.*, 391 U.S. 9, 45-46 n.35 (1968) ("[W]e consider it appropriate in this instance to resolve this question without remand to the court below for initial consideration, in order that this extended proceeding may at last come to an end.").

whether defendants had waived their RFOA defense. A year later, a new panel held that those proceedings were for naught because the original panel's remand order conflicted with this Court's mandate.

Now, fourteen years after the events leading to this litigation, the Second Circuit has ordered the case retried to allow defendants to assert a defense the district court found (and the Second Circuit did not dispute) defendants knowingly and intentionally abandoned at the original trial. In the interim, two plaintiffs have died and the rest have suffered the cost and uncertainty of inordinately protracted litigation. This Court can and should prevent the Second Circuit's latest mistake from adding to that delay and injustice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 24, 2010

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 21st day of December, two thousand nine.

Present: Dennis Jacobs,
Chief Judge,
Peter W. Hall,
Circuit Judge,
J. Garvan Murtha,
District Judge.

Clifford B. MEACHAM, individually and on behalf of all other persons similarly situated, Thedrick L. Eighmie, individually and on behalf of all other persons similarly situated, Allen G. Sweet, individually and on behalf of all other persons similarly situated, Plaintiffs-Appellees,

James R. Quinn, Ph.D., Deborah L. Bush, Raymond E. Adams, Wallace Arnold, Ronald G. Butler Sr., William F. Chabot, Allen E. Cromer, Belinda Gundersen, Clifford J. Levendusky, Bruce E. Palmatier, Neil R. Parcene, Margaret Reynheer, John K. Stannard, David W. Townsend, Carl T. Woodman, Consolidated-Plaintiffs-Appellees,

Hildreth E. Simmons Jr., Henry Bielawski, James S. Chambers, Arthur J. Kaszubski, David J. Kopmeyer, Christine A. Palmer, Frank A. Paxton, Janice M. Polsinelle, Teofils F. Turlais, Bruce E. Vedder, Consolidated-Plaintiffs,

v.

KNOLLS ATOMIC POWER LABORATORY, also known as KAPL, Inc., Lockheed Martin, Inc., John J. Freeh, both individually and as an employee of KAPL and Lockheed Martin, Defendants-Appellants.

No. 09-2037-CV.

December 21, 2009

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be VACATED and the matter REMANDED for a new trial on the liability issue only.

Defendants Knolls Atomic Power Laboratory, Lockheed Martin, and John J. Freeh ("defendants") appeal the judgment of the district court reinstating a prior jury verdict in plaintiffs' favor. Defendants argue that the district court committed clear error in holding that they waived the defense based on reasonable factors other than age ("RFOA"), and that the waiver was not properly excused; they also argue that, if we vacate the waiver and excuse holdings, we should order that judgment be granted in their favor as a matter of law. We assume the parties' familiarity

with the underlying facts, the procedural history, and the issues presented for review.

Vacatur of the judgment is required by adherence to the "mandate rule," which "compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or *impliedly* decided by the appellate court." *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir.2001) (internal quotation marks omitted) (emphasis in original); see also *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 259, 16 S.Ct. 291, 40 L.Ed. 414 (1895). To determine whether a particular issue "remains open for reconsideration on remand, [a] court should look to both the specific dictates of the remand order as well as the broader spirit of the mandate." *Ben Zvi*, 242 F.3d at 95 (internal quotation marks omitted). "[W]e must always look to the opinion to interpret the mandate." *FTC v. Standard Educ. Soc'y*, 148 F.2d 931, 932 (2d Cir.1945).

In an earlier decision in this case, the United States Supreme Court explained that "the only thing at stake . . . is the gap between production and persuasion" and that this Court "showed no hesitation in finding that Knolls prevailed on the RFOA defense, though the court expressed its conclusion in terms of Meacham's failure to meet the burden of persuasion. Whether the outcome should be any different when the burden is properly placed on the employer is best left to that court in the first instance." See *Meacham v. Knolls Atomic Power Lab.*, --- U.S. ----, ----, 128 S.Ct. 2395, 2406, 171 L.Ed.2d 283 (2008) ("*Meacham SC II* "); *see also Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 144 (2d Cir.2006), *vacated by Meacham SC II*, 128 S.Ct. at

2407. Waiver principles are analytically antecedent to an analysis on the merits; we therefore read the Supreme Court's opinion as impliedly but necessarily rejecting plaintiffs' waiver argument.

Our conclusion in this regard finds additional support from the fact that plaintiffs argued forfeiture and abandonment in their brief to the Supreme Court and waiver of the defense at oral argument before the Supreme Court. Brief for the Petitioners at 51-52, *Meacham SC II* (No. 06-1505); Tr. of Oral Argument at 53, *Meacham SC II* (No. 06-1505). The Court, therefore, was squarely presented with plaintiffs' waiver argument, and a natural reading of *Meacham SC II* suggests that it was rejected.

Our summary order issued in this case, *Meacham v. Knolls Atomic Power Lab.*, Nos. 02-7378-cv, 02-7474-cv, 2009 WL 33609 (2d Cir. Jan.7, 2009) (summary order), requires no different result. That order does not constitute a finding regarding waiver, nor, having re-examined the issue in light of the arguments presented in this appeal, does it preclude us now from determining that the mandate rule forecloses reconsideration of the waiver issue.

We therefore remand this case to the district court with instructions to hold a new trial and to allow for whatever discovery is necessary for the parties fairly to litigate the issues regarding liability under the law as it currently stands. The uncertainty and multiple changes in the governing law have complicated the issues in this case to such an extent that neither party is entitled to judgment as a matter of law, either on the merits or on procedural grounds.

We hereby VACATE the judgment of the district court and REMAND for a new trial on the liability issue only.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Clifford B. MEACHAM; Thedrick L. Eighmie; and Allen G. Sweet, all individually and on behalf of all other persons similarly situated; and James R. Quinn, PhD; Deborah L. Bush; Raymond E. Adams; Wallace Arnold; William F. Chabot; Allen E. Cromer; Paul M. Gundersen; Clifford J. Levendusky; Bruce E. Palmatier; Neil R. Pareene; William C. Reynheer; John K. Stannard; David W. Townsend; and Carl T. Woodman, Plaintiffs,

v.

KNOLLS ATOMIC POWER LABORATORY, aka KAPL, Inc.; Lockheed Martin, Inc.; and John J. Freeh, individually and as an employee of KAPL and Lockheed Martin, Defendants.

James R. Quinn, Ph.D., Plaintiff,

v.

Knolls Atomic Power Laboratory, Inc., aka KAPL, Inc.; Lockheed Martin, Inc.; and John J. Freeh, individually and as an employee of KAPL and Lockheed Martin, Defendants.

Nos. 97-CV-12 (DRH), 97-CV-45 (DRH).

May 1, 2009.

MEMORANDUM-DECISION AND ORDER

DAVID R. HOMER, United States Magistrate Judge.

Presently pending is the resolution of three issues, described below, remanded to this Court by the Second Circuit Court of Appeals. The parties have briefed the issues and oral argument was heard on March 26, 2009. For the reasons which follow, the Court holds that defendants waived the affirmative defense at issue, that waiver is not excused, and the Second Amended Judgment filed March 28, 2002 (Docket No. 214) is reinstated.

I. Background

The extended procedural history of these cases[1] commenced on January 6, 1997 when an opt-in class of plaintiffs in the first action filed a complaint alleging disparate treatment and disparate impact age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, and the New York Human Rights Law (HRL), N.Y. Exec. Law § 290 *et seq.* Compl. (Docket No. 1).[2] The actions arose from an involuntary reduction-in-force (IRIF) in 1996 at defendant Knolls Atomic Power Laboratory

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[1] The two actions were consolidated in an order filed February 20, 1998. Docket No. 15.

[2] All references to a docket are to that of the Lead Case.

(KAPL)[3] which resulted in the termination of the employment of the twenty-eight plaintiffs. Following a bifurcated trial on liability and damages, the jury returned verdicts for defendants on plaintiffs' disparate treatment claims, for twenty-six plaintiffs on their disparate impact claims under both the ADEA and the HRL, and awarded plaintiffs[4] a total of $5,077,285.33 in damages. Docket Nos. 119, 124, 126, 128. On December 11, 2000, judgment was entered on the verdicts. Docket No. 133. Defendants then moved for judgment as a matter of law or a new trial. Docket Nos. 137, 196. The motion was denied on February 13, 2002, but remittitur was granted reducing the total damages awarded (including interest) to $4,172,547.89. *Meacham v. Knolls Atomic Power Lab.*, 185 F. Supp. 2d 193 (N.D.N.Y. 2002). Judgment, including an additional award for attorneys' fees and costs, was entered on March 28, 2002. Second Am. J'ment (Docket No. 214).

Defendants appealed. On August 23, 2004, the Second Circuit affirmed the judgment. *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56 (2d Cir. 2004) (*Meacham I*). Defendants petitioned the Supreme Court for a writ of certiorari. While that petition was pending, the Supreme Court decided another case addressing issues raised by a disparate impact claim under the ADEA. *See Smith v. City of*

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[3] Also named as defendants were Lockheed Martin, Inc., KAPL's parent company, and John J. Freeh, KAPL's President and General Manager.

[4] Nine plaintiffs settled their claims and are no longer part of these actions. *See* Docket Nos. 111-17, 208, 209. Seventeen plaintiffs remain.

Jackson, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). The Supreme Court then vacated the Second Circuit's decision and remanded the case to the Second Circuit for further consideration in light of *City of Jackson. KAPL, Inc. v. Meacham,* 544 U.S. 957, 125 S.Ct. 1731, 161 L.Ed.2d 596 (2005). On remand, the Second Circuit vacated the judgment in favor of plaintiffs and, on August 14, 2006, directed that judgment be entered in favor of defendants. *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 147 (2d Cir. 2006) (*Meacham II*). Plaintiffs then petitioned the Supreme Court for a writ of certiorari. The Supreme Court granted the petition. On June 19, 2008, the Supreme Court vacated *Meacham II* and remanded for further proceedings. *Meacham v. Knolls Atomic Power Lab.*, ---U.S. ----, 128 S.Ct. 2395, 2406-07, 171 L.Ed.2d 283 (2008).

On remand, the Second Circuit directed the parties to submit briefs on the three questions set forth below. Following submission of those briefs, the Second Circuit entered a summary order on January 7, 2009 remanding the case to this Court for further proceedings as follows:

[T]he Supreme Court instructed us to determine "whether the outcome [of these cases] should be any different [from *Meacham II* in light of its holding]." *Id.* at 2406-07. Because this determination requires a factual inquiry that this Court lacks the institutional capacity to perform, we now remand to the [d]istrict [c]ourt . . . for consideration of the following issues:

(1) Did the employer waive the RFOA affirmative defense by its conduct at the district court?

(2) If so, was any such waiver excused as [ ] "the result of conflicting statements in our case law, for which [the employer] should not be penalized"?

(3) If the employer did not waive the defense, or if any such waiver is excused:

> (a) Should the employer prevail as a matter of law on the RFOA defense in light of the Supreme Court's decision?
>
> (b) Should this case be resolved on the record created, or is a new trial warranted in light of the change in the relevant law?

Depending on the findings and rulings made in considering these questions, the district court may enter such orders and conduct such further proceedings (including discovery and trial) as the district court deems appropriate. *Meacham v. Knolls Atomic Power Lab.*, 305 Fed. Appx. 748, 749 (2d Cir. 2009) (*Meacham III*) (footnote and citation omitted); Docket No. 299.

No party requested discovery concerning any of these issues and all parties stated their view that the questions pending should be resolved on the existing record. Order filed Jan. 15, 2009 (Docket No. 297) at 1. For purposes of this decision, familiarity with the prior decisions of the various courts is assumed.

II. Discussion

1. Did the employer waive the RFOA affirmative defense by its conduct at the district court?

The ADEA provides in pertinent part that an adverse employment action which otherwise has a disparate impact on older workers may nevertheless be excused if it "is based on reasonable factors other than age. . . . ." 29 U.S.C. § 623(f)(1) ("RFOA").[5] In *Meacham II,* the Second Circuit held that the burden of persuasion on RFOA was borne by the employee and, since plaintiffs here failed to meet that burden, defendants were granted judgment as a matter of law. 461 F.3d at 144-46. The Supreme Court held that the RFOA was an affirmative defense for which the employer bears the burden of persuasion. 128 S.Ct. at 2406-07. The first question presented here is whether defendants waived their RFOA defense.

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[5] "[C]laims under the HRL are analyzed identically to claims under the ADEA [and] the outcome of an employment discrimination claim made pursuant to the HRL is the same as it is under the ADEA . . . ." *Smith v. Xerox Corp.,* 196 F.3d 358, 363 (2d Cir. 1999) (quoted in *Meacham II,* 461 F.3d at 146). In addition, the HRL itself contains an identical exception to that in the ADEA at issue here. *See* N.Y. Exec. Law § 296(3-a)(d). The discussion herein regarding plaintiffs' claims under the ADEA and its exception apply as well to their claims under the HRL and its identical exception.

a. Waiver[6]

Generally, waiver requires demonstration that a party intentionally relinquished a known right. *See Patterson v. Balsamico,* 440 F.3d 104, 112 (2d Cir. 2006). The party asserting waiver bears the burden of demonstrating the facts supporting such a claim. *See Havoco of Am., Ltd. v. Hilco, Inc.,* 731 F.2d 1282, 1290 n. 6 (7th Cir. 1984). Thus, to establish that defendants waived their RFOA defense, plaintiffs must show that defendants had both

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[6] Plaintiffs also utilize "forfeiture" and "abandonment" to characterize defendants' conduct. Forfeiture "refers to a litigant's failure to make the timely assertion of a right." *Schipani v. McLeod*, 541 F.3d 158, 160 n. 3 (2d Cir. 2008) (citation and internal quotation marks omitted); *see also Patterson v. Balsamico,* 440 F.3d 104, 112 (2d Cir. 2006). On the other hand, abandonment and waiver appear to be interchangeable. *See Capital Ventures Int'l v. Republic of Argentina,* 552 F.3d 289, 297 (2d Cir. 2009); *Tom Rice Buick-Pontiac v. Gen. Motors Corp.,* 551 F.3d 149, 157 (2d Cir. 2008). Because the concepts are so closely related and because the Second Circuit has framed the issue here as one of "waiver," the issue presented here will be considered only as one of waiver. *See Freytag v. C.I.R.,* 501 U.S. 868, 895 n. 2, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring) (noting that the Supreme Court had so often used "waive" and "forfeit" "interchangeably that it may be too late to introduce precision.").

knowledge of the existence of the RFOA defense and the intention to abandon it. "Waiver may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage." *Tom Rice Buick-Pontiac*, 551 F.3d at 157 (citation omitted). The waiver determination requires consideration of all circumstances relevant to the knowledge and intent of the party in question. *See In re Am. Express Merchants' Litig.*, 554 F.3d 300, 321 (2d Cir. 2009) (citation omitted); *Frommert v. Conkright*, 535 F.3d 111, 121 (2d Cir. 2008) (citation omitted); *Dallio v. Spitzer*, 343 F.3d 553, 563 (2d Cir. 2003) (noting that "the Supreme Court has repeatedly emphasized that [a claim of] . . . waiver . . . [requires examination of] the totality of facts and circumstances in a given case.") (internal quotations and citation omitted).

i. Knowledge

Defendants' knowledge of the availability of the RFOA defense is evidenced by three circumstances. First, the statutory exemption which afforded the defense was enacted in 1967 in the original ADEA and the RFOA language has remained in the statute unchanged since enactment. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202 § 4(f)(1), 29 U.S.C. § 623(f)(1).[7] Thus, the statutory

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[7] The ADEA was amended multiple times in other respects prior to 2000. *See, e.g.*, Deficit Reduction Act of 1984, Pub. L. No. 98-369 § 2301 (adding provisions regarding spouses); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509 § 9201 (modifying provisions regarding employee

language affording the defense had been in effect for thirty-three years at the time of the trial herein.

Second, the trial here commenced on June 20, 2000. Docket No. 79. The case law in this circuit then recognized the RFOA exemption as a defense available to employers in ADEA cases. For example, four years prior to the trial, the Second Circuit found the RFOA exemption unavailable to an employer where age constituted the *only* factor supporting the employer's mandatory retirement policy. In so holding, the court noted that

> The plain language of § 623(f)(1) makes it clear that an employer has a defense if his policy is based on reasonable factors "other than age," *not* if the policy is reasonably based on age. By its terms, the statute supplies an exception for "age-neutral" decisions based on other factors such as health or even education that might be correlated with age . . . not an exception for policies that *explicitly but reasonably* discriminate based on age. Our view has been adopted by at least two other courts of appeals . . . .

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pension benefit plans); An Act to Amend the Age Discrimination Act of 1967, Pub. L. No. 101-521 (adding clarifying language); Age Discrimination in Employment Amendments of 1996, Pub. L. No. 104-208 § 119 (clarifying *inter alia* the Act's applicability to law enforcement officers and fire fighters); Higher Education Amendments of 1998, Pub. L. No. 105-244 § 941 (adding provisions regarding early retirement incentive plans for tenured staff at higher education institutions).

E.E.O.C. v. Johnson & Higgins, Inc., 91 F.3d 1529, 1541 (2d Cir. 1996) (internal citations omitted) (emphasis in original). Other decisions noted the exemption as well. *See DiCola v. SwissRe Holding (North Am.), Inc.*, 996 F.2d 30, 32-33 (2d Cir. 1993); *Maresco v. Evans Chemetics*, 964 F.2d 106, 110, 113 (2d Cir. 1992) (holding that the ADEA does not make it "unlawful . . . for an employer to discharge an employee based on reasonable factors other than age" (citing the RFOA) and noting that cost and administrative convenience may provide two such reasons).

Finally, but most significantly, defendants asserted the RFOA exemption as a defense in their answer by pleading as their "Second Defense" that:

> [t]he employment of plaintiffs with KAPL was terminated for good cause and for reasonable factors other than their ages within the meaning of the ADEA . . . and all other laws invoked by plaintiffs herein.

Ans. (Docket No. 5) at 11. There can be no doubt, therefore, and defendants do not deny, that defendants fully knew of the RFOA exemption and that they possessed the right to assert RFOA as a defense.

ii. Intentional Relinquishment

As to whether defendants intentionally relinquished that right, no evidence has been proffered that defendants ever affirmatively waived the defense. This determination thus requires consideration of defendants' failure to pursue the

defense. *Tom Rice Buick-Pontiac*, 551 F.3d at 157-58. There exists no dispute that having asserted the RFOA defense in their answer, defendants never again asserted that defense throughout the trial, in their appeal, in their petition for certiorari, or at any time before *Meacham II*. *See* Defs. Mem. of Law (Docket No. 305) at 24. Specifically, defendants moved for summary judgment before trial but did not mention the RFOA in their motion papers. *See* Defs. Mem. of Law (Docket No. 36); Defs. Reply Mem. of Law (Docket No. 45). Defendants also did not mention the defense in their trial memorandum filed the week before trial commenced. Defs. Trial Mem. (Docket No. 66). Defendants did not mention RFOA in either their opening statement or their closing argument. *See, e.g.*, T. 4555-63[8] (closing argument). At the close of plaintiffs' direct case and again at the close of all the evidence, defendants moved for judgment as a matter of law (JMOL) pursuant to Fed. R. Civ. P. 50(a) but made no mention of RFOA in either motion. T. 2450-87, 4413-18.

More significantly, defendants remained silent on the RFOA at each critical stage regarding the jury instructions and the special interrogatories in the verdict form. Their proposed jury instructions contained no mention of RFOA. Docket No. 67. At the charge conference, defendants made no supplemental request for an RFOA instruction nor any objection to the omission from the charge of any instruction on that defense. T. 4412-58. Defendants also made no request for inclusion of a special interrogatory on the

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[8] "T." followed by numbers refers to the pages of the trial transcript.

defense in the verdict form. *Id.*; *see also* Jury Verdict (Docket No. 86). The charge as given and special interrogatories as submitted contained no mention of RFOA, but defendants voiced no objection to either before a verdict was returned. T. 4741. It was incumbent upon defendants to assert their RFOA defense at this stage and their failure to do so, without more, generally constitutes a waiver of the defense. *See Patrolmen's Benevolent Ass'n of New York v. City of New York*, 310 F.3d 43, 54-55 (2d Cir. 2002) (holding that errors in jury charge or verdict sheet which were unasserted at trial were waived and could be reviewed only for fundamental error).

In *Meacham I*, defendants failed to raise RFOA as an issue on the appeal. Defs. Brief on Appeal (Docket No. 304, Ex. E); 2003 WL 24150644. The RFOA issue was not addressed in *Meacham I*. Defendants did not raise the RFOA issue in their petition for a writ of certiorari to the Supreme Court. *See* Defs. Pet. for Writ of Cert., 2005 WL 92510.[9] While that petition

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[9] Defendants did employed the phrase "reasonable factors other than age" in their petition for the first time since their answer eight years earlier. Defs. Pet., 2005 WL 92510, at *12-13. The phrase in defendants' brief asserted a factual description of the four criteria utilized by KAPL on the matrices to select employees for the IRIF but did not raise any issue regarding the RFOA defense. *Id.* Defendants acknowledge that the first mention of the RFOA defense after their answer occurred in 2005 in *Meacham II* when the EEOC referred to the defense in its *amicus curiae* brief. Defs. Mem. of Law (Docket No. 305) at 23-24.

was pending, the Supreme Court decided *City of Jackson* in which it noted that the RFOA provision in the ADEA "significantly narrows its coverage." 544 U.S. at 233, 125 S.Ct. 1536. The Supreme Court then vacated *Meacham I* and remanded for reconsideration in light of *City of Jackson*. 544 U.S. 957, 125 S.Ct. 1731. On remand to the Second Circuit, defendants raised the RFOA issue for the first time five years after the trial. *See* Defs. Brief on Reconsideration, 2005 WL 2174605, at *16-21. Thus, plaintiffs have demonstrated from the record in this case that after defendants filed their answer on February 28, 1997 through the trial in 2000 until proceedings in *Meacham II* in 2005, defendants never raised RFOA as a defense.

Moreover, defendants' decision to abandon their RFOA defense appears the product of a rational choice of strategies. As Judge Pooler noted in *Meacham II*,

> [f]rom all that appears in the record before us, defendants may have made a strategic decision not to press the RFOA defense, believing that it would be easier to require plaintiffs to establish disparate impact under the [then applicable] analysis than for defendants themselves to prove a reasonable factor other than age . . . .

461 F.3d at 153 (Pooler, J., dissenting). It appears that defendants chose to pursue a strategy which minimized their burden of proof and maximized that of plaintiffs.[10] While the cost of that strategic choice

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[10] Defendants defended the disparate impact claims by arguing, *inter alia*, that plaintiffs had failed to meet their burdens of identifying a facially

was to forgo the RFOA defense, it constituted a rational choice given the competing considerations. *See also Blissett v. Coughlin,* 66 F.3d 531, 539 (2d Cir. 1995) (finding a waiver of the qualified immunity affirmative defense and noting that "[w]hether this was a matter of strategy or mere inadvertence is of no consequence to our consideration.").

Finally, defendants also pleaded other defenses in their answer which they subsequently abandoned. For example, in their Fourth and Fifth Defenses, defendants asserted challenges to the propriety of the class of plaintiffs and to the class representatives. In their Seventh Defense, defendants contended that the actions were barred by the statute of limitations. In their Eighth Defense, defendants asserted that plaintiffs failed to satisfy jurisdictional prerequisites. In their Ninth and Tenth Defenses, defendants contended that defendants Lockheed and Freeh were not "employers." In the Twelfth Defense, defendants asserted that any claims for personal injuries were barred by the New York State Workers' Compensation Law. *See* Ans. at 11-12. Defendants also never sought judgment on any of these defenses, never requested a determination of them by the jury or the Court, and thus waived each of these seven defenses as well.

For these reasons, plaintiffs have satisfied their burden of demonstrating that defendants' intentionally relinquished their right to assert the

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neutral policy, statistical analysis to support their claims, and the existence of an equally effective alternative.

RFOA defense unless other reasons exist for defendants' failure to press and preserve the defense.

iii. Defendants' Contentions

In response, defendants assert four principal arguments. First, defendants contend that while they failed to articulate their RFOA defense using the precise words "reasonable factors other than age," they pressed and preserved the defense in functionally equivalent terms. Analysis of this contention begins with the law applicable to an ADEA disparate impact claim at the time of trial in 2000. To sustain a disparate impact claim at that time, the employee first was required to establish a prima facie case by specifying an employment practice which, although facially neutral, adversely impacted older employees.[11] *Smith v. Xerox Corp.*, 196 F.3d 358, 367-68 (2d Cir. 1999). The burden then shifted to the employer to offer a business necessity, or legitimate business justification, for the challenged employment practice. *Id.* (citation omitted). If an

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[11] As to this first step, the jury found that plaintiffs had sustained their burden of proof (Jury Verdict at 11, question 6), defendants' post-trial motion for JMOL on this question was denied by this Court (185 F.Supp.2d at 206-13), the Second Circuit affirmed in *Meacham I* (381 F.3d at 71-76), the issue was not reconsidered by the Second Circuit in *Meacham II*, and the Second Circuit made no mention of this issue in its remand order in *Meacham III*. Accordingly, the sufficiency of plaintiffs' evidence on this issue is not presently pending before the Court and will not be further addressed.

employer offered such a business justification, the burden then returned to the employee to show that the employer's proffered reason was merely a pretext for discrimination. *Id.* (citations omitted); *see also Meacham I*, 381 F.3d at 72 (affirming verdict under then-existing standard).

At the second stage, the employer bore the burden of articulating "a legitimate business justification," or "business necessity," for the challenged employment practice. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 658-60, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).[12] This burden was one of production, not persuasion. *Id.* at 659-60, 109 S.Ct. 2115; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988); *E.E.O.C. v. Joint Apprenticeship Comm.*, 186 F.3d 110, 120 (2d Cir. 1999). An employer met this minimal burden by articulating a business necessity or reason for the

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[12] Cases in this and other circuits had also described the employer's burden as one to produce "legitimate nondiscriminatory reasons" other than age. *See, e.g., E.E.O.C. v. Joint Apprenticeship Comm.*, 186 F.3d 110, 121 (2d Cir. 1999); *Lieberman v. Gant*, 630 F.2d 60, 65 (2d Cir. 1980). Defendants here pleaded a separate defense using this language, *see* Ans. at 12 ("Eleventh Defense"); *see also id.* at 11 ("Third Defense"), and frequently employed that phrase during trial. *See, e.g.*, Defs. Closing Argument, T. 4554-57, 4561-64. Thus, while close in concept to "reasonable factors other than age," the use of "legitimate nondiscriminatory reasons other than age" clearly was intended to, and did, raise an issue other than the RFOA defense.

employment practice. *See Watson,* 487 U.S. at 997-98, 108 S.Ct. 2777. If an employer articulated a legitimate business justification, the burden then shifted back to the employee to prove that "the employer's proffered explanation was merely a pretext for discrimination." *Xerox Corp.,* 196 F.3d at 365 (citation omitted). The employee could satisfy this burden by evidence "that another practice would achieve the same result at comparable cost without causing a disparate impact on the protected group . . . ." *Id.* (citing *Wards Cove,* 490 U.S. at 660-61, 109 S.Ct. 2115).[13]

Thus, throughout the pretrial, trial, post-trial, and appellate proceedings until *City of Jackson* in 2005, defendants used "business necessity," "business justification," "legitimate business justification," and similar phrases in seeking to meet their burden at the second stage and in challenging plaintiffs' evidence at the third stage. Defendants offered substantial evidence that KAPL utilized matrices to select those whose employment would be terminated in the IRIF and that the matrices assessed employees based on four criteria-performance, flexibility, criticality, and length of service. Defendants contend

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[13] As discussed further *infra,* the Supreme Court's decisions in *Meacham* and *City of Jackson* removed an employer's burden of production at the second stage, precluded an employee from demonstrating discrimination at the third stage by evidence of other means to achieve the same end without a discriminatory impact, and placed the burden of proof on the RFOA defense on the employer.

that the use of these phrases and the introduction of this evidence regarding the matrices sufficed to preserve the RFOA defense asserted in their answer.[14]

This argument fails for several reasons. First, "business necessity" and "business justification" were not sufficiently equivalent to RFOA. "Business necessity" and "business justification" required an employer to offer non-age reasons for the employment action at issue, not reasons why an employee was selected for the adverse action. Thus, defendants here asserted as their "business necessity" the budgetary need to reduce their workforce while still retaining employees with skills critical to the performance of KAPL's functions. *See, e.g.*, Defs. Closing Argument, T. 4516 (arguing that defendants satisfied burden of articulating business necessity through proof of need for IRIF); Defs. Post-Trial Mem. of Law (Docket No. 137) at 18 (same); *see also Meacham*, 185 F.Supp.2d at 213 (identifying same as defendants' articulated "business necessity"); *Meacham I*, 381 F.3d at 74-75 (same).[15] On the other hand, the RFOA defense

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[14] The Supreme Court noted that the multiple shifts of the burdens of proof and production under the law in effect at the time of trial were "a wasteful and confusing structure of proof." *Meacham*, 128 S.Ct. at 2405. Notwithstanding, if defendants had pressed their RFOA defense, it would have been a simple matter to add an instruction on the defense and to insert after Question 8 on the verdict form an additional question on the defense.

[15] At other times, defendants argued that the factors included on the matrices constituted

required proof of the use of nonage reasons for the selection of the plaintiffs for the IRIF. Since the trial, defendants have identified such reasons as those criteria included on the matrices, particularly flexibility and criticality. *See, e.g., Meacham II,* 461 F.3d at 143-44. Therefore, defendants' references at trial to "business necessity" and "business justification" did not suffice to press or preserve an RFOA defense.

Second, defendants never indicated in any way that their RFOA defense was subsumed in the assertions of "business necessity" and "business justification." Defendants never explicitly stated that they were including RFOA in those assertions. Defendants have not cited any instance in the trial record where they referred, inadvertently or otherwise, to RFOA rather than to "business necessity" or "business justification." Thus, nothing in the record indicates that defendants ever subjectively intended that their references to "business necessity" and "business justification" be taken as including their RFOA defense.

Third, references to "business necessity" and "business justification" were insufficient to place either plaintiffs or the Court on notice that defendants were pressing and preserving their RFOA defense. Defendants never once used the term of art "reasonable factors other than age" after pleading it in their answer as would have given notice that they continued to assert the defense. Neither "business

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"legitimate nondiscriminatory reasons" for the selection of plaintiffs in the IRIF. *See, e.g.*, Defs. Closing Argument, T. 4554-57, 4561-64.

necessity," "business justification," evidence, nor argument concerning the four factors on the matrices reasonably served to give such notice. There is no evidence in the record that either plaintiffs or the Court otherwise perceived that defendants were pressing that defense. Additionally, both plaintiffs' counsel and the Court have affirmatively stated that they were unaware that defendants were pressing the defense. As here, defendants commonly plead numerous defenses in their answers which they abandon at various stages prior to submission of a case to a jury. A defendant's failure to seek judgment as a matter of law on a pleaded defense, whether affirmative or not, or to seek a jury instruction on the defense in words reasonably calculated to advise that the defense is an issue for resolution generally constitutes abandonment of the defense. *See McCardle v. Haddad*, 131 F.3d 43, 51-52 (2d Cir. 1997) (finding waiver of a defense where the defendant failed to refer to the defense in a pretrial memorandum, made no motion for summary judgment on that ground, and made no mention of the defense in proposed jury instructions); *Walsh v. Mellas*, 837 F.2d 789, 799-800 (7th Cir. 1988) (finding waiver of a defense where the defense was raised for the first time on the second appeal). Defendants' failure to press the RFOA defense in words reasonably understood as asserting that defense rather than another cannot survive a claim of waiver.

Defendants next contend that any relinquishment of the RFOA defense was not intentional because defendants were unaware that they bore the burden of proof on that defense. Prior to *Meacham II*, no case in the Second Circuit had held that the employer bore the burden of proof and persuasion on the RFOA

defense or, indeed, ever addressed the burden issue at all. Defendants further note that in a 1996 decision, the Second Circuit cited "with approval" an Eleventh Circuit decision holding that the employee bore the burden of proof on the RFOA defense. *See Johnson & Higgins,* 91 F.3d at 1541 (citing *Iervolino v. Delta Air Lines, Inc.,* 796 F.2d 1408, 1414-19 (11th Cir. 1986)). Although *Johnson & Higgins* cited *Iervolino* with approval, the citation supported a different proposition of law and *Johnson & Higgins* was silent on the issue of which party bore the burden of proof. *Id.* Thus, at the time of trial, no decision in the Second Circuit or the Supreme Court had determined which party bore the burden of proof on the RFOA defense. Having pleaded the RFOA as a defense, defendants assumed the burden of pressing the defense at trial or risking waiver of the defense.

Moreover, the absence of clearly established law on a particular issue does not excuse defendants' failure to press their defense here.[16] First, defendants asserted RFOA as an affirmative defense in their answer. Ans. at 11. It was asserted among eleven other defenses. Several of those were clearly affirmative defenses, including mitigation of damages (Sixth Defense), *see Federal Ins. Co. v. Sabine Towing & Transp. Co., Inc.,* 783 F.2d 347, 350-51 (2d Cir. 1986); and statute of limitations (Seventh Defense), *see Bano v. Union Carbide Corp.,* 361 F.3d 696, 710 (2d Cir. 2004). Defendants recognized the need to plead the RFOA defense and pleaded it as an affirmative defense. *See Meacham II,* 461 F.3d at

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[16] *See also* subsection 2 *infra.*

152 (Pooler, J., dissenting) ("Defendants . . . included RFOA as an affirmative defense to liability in their answer."); *see also* Transcript of Oral Argument before S.Ct. (Docket No. 304-7) at 6.[17] Prior to and at the time of trial, then, defendants evidenced no confusion or uncertainty over who bore the burden of proof on their RFOA defense and never raised the issue until the second appeal.

Furthermore, the fact that the Second Circuit in *Meacham II* allocated the burden of proof to the employee rather than to the employer as subsequently held by the Supreme Court affords defendants no relief. *Meacham II* came five years after the trial and after defendants' silence on the defense through the trial and the first appeal. There exists no evidence to suggest that defendants were uncertain or confused about the defense at the time of trial. The fact that issues arose concerning the defense, never previously raised by defendants here, as the result of *City of Jackson* years after the trial and first appeal cannot support a claim that

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[17] JUSTICE STEVENS: But did you plead this as an affirmative defense? Did you plead it as an affirmative defense?

MR. WAXMAN [counsel for defendants]: We pleaded it as a-I can't bring the complaint to mind, but we pleaded it as a separately specified defense, yes. We said, in our answer to the complaint, we said this is a reasonable factor other than age."

Transcript at 49.

defendants were unaware or uncertain about the availability of the RFOA defense at the time of trial. *See DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-73 (2d Cir. 1994) (holding that change in law after entry of judgment did not warrant reopening case); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 851 (5th Cir. 1990) (holding that a subsequent change by the Supreme Court in the applicable rule of law did not warrant re-opening case); *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 757 (2d Cir. 1986).

Finally, defendants contend that by failing themselves to raise at trial defendants' waiver of the RFOA defense, plaintiffs waived any claim of waiver by defendants. This unusual contention appears to bear both on whether defendants knew of their right to the RFOA defense and whether they intentionally relinquished that right. The contention fails as to both. As to defendants' knowledge, for the reasons discussed *supra*, defendants clearly knew of their right to the defense. As to intentional relinquishment, the issue requires examination of defendants' conduct, not plaintiffs'. Defendants have offered no authority requiring plaintiffs to assert defendants' waiver in the district court to enforce defendants' waiver at this stage. Whether defendants waived the RFOA defense depends only on their conduct and, if waiver is found, it cannot be vitiated by plaintiffs' failure to assert that waiver at any earlier stage of the proceedings.

Thus, defendants had actual knowledge of their right to assert the RFOA defense and did so in their answer. Defendants thereafter failed to mention the defense again until the second appeal. In particular,

they failed to seek judgment on the defense, request a jury instruction or special interrogatory on the defense, or object to the charge or verdict form for omitting any instruction or question on the defense. Nothing impeded defendants from pressing or preserving the defense. Therefore, defendants' choice to abandon the defense at trial was fully intentional. Accordingly, defendants waived the RFOA affirmative defense by their conduct at the district court.

2. If so, was any such waiver excused as "the result of conflicting statements in our case law, for which [the employer] should not be penalized"?

In stating this question in *Meacham III*, the Second Circuit specifically referred to its decision in *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 485 (2d Cir. 2008). *See* 305 Fed. Appx. at 749. In that case, investors sued a bank and others alleging fraud in analyst reports concerning certain stock transactions. The district court granted class certification and defendants filed an interlocutory appeal. In reversing the district court's holding, the Second Circuit noted that defendants had failed to offer evidence rebutting an essential presumption in the proceedings before the district court but declined to find that defendants were precluded by waiver from offering such evidence on remand. The court stated that

> defendants' error may have been the result of conflicting statements in our case law, for which they should not be penalized. Based on the state of

> the law at the time, defendants could not have been expected to have known at that stage of the proceedings that (1) they were entitled to a full rebuttal as a matter of law, and (2) . . . they bore the burden of [proof] . . . .

Id. at 485. Thus, as set forth in *Salomon Analyst* and in the Second Circuit's second question on remand, excusal of defendants' waiver presents a threshold question whether there existed conflicting statements in Second Circuit case law at the time of trial regarding the burden of proof on their RFOA defense.

As of the time of trial in June and July, 2000, no decision in the Second Circuit had discussed the burden of proof on the RFOA defense, directly or otherwise. Decisions noted the existence of the RFOA exception. *See, e.g., Johnson & Higgins,* 91 F.3d at 1541 (noting that the RFOA provision created a "broad" exception to employer liability under the ADEA but not addressing the burden of proof on the defense); *DiCola,* 996 F.2d at 32; *Maresco,* 964 F.2d at 113. Defendants have cited no decisions in the Second Circuit prior to the trial which could reasonably be construed as in conflict over the RFOA exception or the burden of proof on that defense.

Absent demonstration of such conflicting statements, no basis is presented to excuse defendants' waiver. Defendants contend, however, that any waiver should be excused either because a conflict existed among the circuits as to the burden of proof or because there was uncertainty as to the burden of proof. First, these contentions exceed the question presented by the Second Circuit on this remand. That question asks only whether any waiver should be excused "as 'the result of *conflicting*

statements in *our* case law for which [the employer] should not be penalized'?" *Meacham III*, 305 Fed. Appx. at 749 (emphasis added). The scope of the remand is thus limited to (a) conflicting statements and (b) in the Second Circuit case law. Defendants' contentions here exceed the scope of the remand order. *See Ginett v. Computer Task Group, Inc.*, 11 F.3d 359, 361(2d Cir. 1993) (holding that " '[t]he district court's actions on remand should not be inconsistent with either the express terms or the spirit of the mandate.' ") (citing *Quern v. Jordan*, 440 U.S. 332, 347 n.18, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979)).

As to their merits, defendants' contentions would require extension of the narrow exception recognized in *Salomon Analyst* to significantly broader circumstances. Parties are obliged to follow the law as determined by the circuit in which a case is brought. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (citations omitted) (holding that "[c]ircuit law . . . binds all courts within a particular circuit . . . ."). The exception for conflicting statements within a circuit rests on principles of fairness in that a party should not be penalized if the statements of a court reasonably cause confusion to the prejudice of the party. *See Salomon Analyst*, 544 F.3d at 485. No such concerns for fairness exist in the more frequently encountered circumstance of conflicts between circuits. A party is there bound by the determination of the law in the circuit where the case is brought. *See Hart*, 266 F.3d at 1171.

Where, as here, there existed no controlling precedent in the circuit, the considerations remain the same. The absence of controlling authority in the

circuit on the precise issue presented here,-the burden of proof on the RFOA defense-affords no excuse for failing to raise and preserve the issue in the district court, for it remains the obligation of a party to raise in the district court whatever issues that party may wish to preserve for appeal. *See In re Klein Sleep Prods., Inc.*, 78 F.3d 18, 29 (2d Cir. 1996) (holding that by failing to press its claims in the district court, a party failed to preserve those claims for review by either the district court or the Second Circuit); *Blissett*, 66 F.3d at 539. The fact that the issue was recognized by a party only after trial or that a post-trial appellate court ruling may have alerted a party to an additional argument cannot excuse silence on that issue at trial lest no judgment ever be final. *See Holzsager v. Valley Hospital*, 646 F.2d 792, 796 (2d Cir. 1981) (holding that a post-trial change in the law may excuse waiver only where a new defense is created or a legal impediment to asserting a defense is removed);[18] *see also Paese v. Hartford Life & Accident Ins. Co.*, 449 F.3d 435, 447 n.4 (2d Cir. 2006) (excusing waiver where defendant could not have known of an affirmative defense before it was announced in appellate decision); *Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004) (holding that a waiver may be excused "only when the defense, if timely asserted, would have been futile under binding precedent" and citing *Holzsager*, 646 F.2d at 794-96).

Thus, no conflicting statements in Second Circuit law concerning the RFOA defense existed at the time

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[18] There has been presented no claim or evidence that either circumstance was present here.

of the trial here. Neither conflicts among circuit courts, silence on the issue in the Second Circuit at the time of trial, nor decisions on the issue by the Second Circuit or the Supreme Court years after the trial excuse defendants' waiver under the *Salomon Analyst* exception to the waiver rule. Accordingly, defendants' waiver is not excused.

3. If the employer did not waive the defense, or if any such waiver is excused:

(a) Should the employer prevail as a matter of law on the RFOA defense in light of the Supreme Court's decision?

(b) Should this case be resolved on the record created, or is a new trial warranted in light of the change in the relevant law?

According to the remand order in *Meacham III*, the third question need be answered only if no waiver is found or if any such waiver is excused. Having concluded that defendants waived their RFOA defense and that their waiver is not excused, the third question need not be addressed.

III. Conclusion

For the reasons stated herein, it is hereby **ORDERED** that the Second Amended Judgment (Docket No. 214) be **REINSTATED.**[19]

IT IS SO ORDERED.

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[19] It is unclear at this stage whether the Second Amended Judgment remains effective or should be reinstated. That judgment was affirmed in *Meacham I*, 381 F.3d at 79. That affirmance was vacated by the Supermen Court and remanded to the Second Circuit for reconsideration. *KAPL, Inc. v. Meacham*, 544 U.S. at 957, 125 S.Ct. 1731. On reconsideration, the Second Circuit vacated the judgment and remanded with instructions to enter judgment for defendants. *Meacham II*, 461 F.3d at 147. Plaintiffs petitioned for a writ of certiorari in the Supreme Court before the mandate from *Meacham II* was ever received in the district court and the Second Amended Judgement was never vacated. The Supreme Court vacated *Meacham II* and remanded the case to the Second Circuit for further consideration. *Meacham*, 128 S.Ct. at 2407. The remand order in *Meacham III* authorized this Court to "enter such orders . . . as the district court deems appropriate." 305 Fed. Appx. at 749. It appears from this history that the Second Amended Judgment remains in effect since the decision in *Meacham II* vacating it has itself been vacated. Nevertheless, to insure procedural regularity and the existence of a final judgment, reinstatement of that judgment is ordered here.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of January, two thousand nine.

Present: Hon. Dennis Jacobs,
Chief Judge,
Hon. Joseph M. McLaughlin,
Hon. Rosemary S. Pooler,
Circuit Judges.

Clifford B. MEACHAM, Thedrick L. Eighmie, and Allen G. Sweet, individually and on behalf of all other persons similarly situated, Plaintiffs-Appellees-Cross-Appellants,

v.

Knolls Atomic Power Laboratory, a/k/a KAPL, Inc., Lockheed Martin Corporation and John J. Freeh, both individually and as an employee of KAPL and Lockheed Martin, Defendants-Appellants-Cross-Appellees.

No. 02-7378.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the case be REMANDED to the district court.

Plaintiffs are former employees of Defendant Knolls Atomic Power Laboratory ("the employer") who lost their jobs and sued pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 631(a), and the New York Human Rights Law, N.Y. Exec. Law § 296(3-a)(a). Following our August 14, 2006 decision in Meacham v. Knolls Atomic Power Laboratory, 461 F.3d 134 (2d Cir. 2006), Plaintiffs appealed to the United States Supreme Court citing conflicting decisions regarding the assignment of the burden of persuasion on the reasonable-factors-other-than-age ("RFOA") defense. The Supreme Court granted certiorari, vacated, and remanded to us. *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395, 171 L. Ed. 2d 283 (2008). We assume the parties' familiarity with the underlying facts and the extensive procedural history of this case.

For the reasons stated in its June 19, 2008 opinion, the Supreme Court held that "the RFOA exemption is an affirmative defense" for which the employer bears the burden of persuasion. *Meacham*, 128 S.Ct. at 2404, 2406. After clarifying this allocation of the burden, the Supreme Court instructed us to determine "whether the outcome [of this case] should be any different when the burden is properly placed on the employer." *Id.* at 2406-07. Because this determination requires a factual inquiry that this Court lacks the institutional capacity to perform, we now remand to the United States

District Court for the Northern District of New York for consideration of the following issues:

(1) Did the employer waive the RFOA affirmative defense by its conduct at the district court?

(2) If so, was any such waiver excused as the "the result of conflicting statements in our case law, for which [the employer] should not be penalized"?[1]

(3) If the employer did not waive the defense, or if any such waiver is excused:

> (a) Should the employer prevail as a matter of law on the RFOA defense in light of the Supreme Court's decision?
>
> (b) Should this case be resolved on the record created, or is a new trial warranted in light of the change in the relevant law?

Depending on the findings and rulings made in considering these questions, the district court may enter such orders and conduct such further proceedings (including discovery and trial) as the district court deems appropriate. Any further appeal in this case will be assigned to a new panel in the ordinary course.

We hereby **REMAND** to the district court for further proceedings in accordance with this order.

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[1] *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 485 (2d Cir. 2008).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of July, two thousand eight.

Present: Hon. Dennis Jacobs,
Chief Judge,
Hon. Joseph M. McLaughlin,
Hon. Rosemary S. Pooler,
Circuit Judges.

CLIFFORD B. MEACHAM, et al.,

Plaintiffs-Appellees-Cross-Appellants,

v.

KNOLLS ATOMIC POWER LABORATORY, a/k/a KAPL, Inc., et al.,

Defendants-Appellants-Cross-Appellees.

02-7378-cv (L), 02-7474-cv (XAP)

Counsel is instructed to submit a letter brief of no more than five (5) single-spaced pages discussing the following questions:

> In view of the Supreme Court's opinion vacating this Court's judgment, how should this Court proceed on remand? Did the employer waive the affirmative defense of a reasonable factor other than age by not requesting a charge on that defense and/or not objecting to the court's charge? Should the defendants prevail as a matter of law on their "reasonable factor other than age" defense? Is a new trial required?

The letters should be filed by fax (with service by fax) no later than 5:00 p.m. on Monday, August 4, 2008. Counsel is not required to use the CAMP process but it is the Court's suggestion that they avail themselves of it.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____
Frank Perez, Deputy Clerk

LETTER BRIEF

August 4, 2008

United States Court of Appeals for the Second Circuit

Daniel Patrick Moynihan U.S. Courthouse

500 Pearl Street, Room 370

New York, NY 10007

RE: Meacham v. KAPL, Inc. et al. 02-7378-cv (L), 02-7474-cv (XAP)

Defendants' Letter Brief On Remand from the Supreme Court

Dear Judges Pooler, Jacobs, and McLaughlin:

On June 19, 2008, the Supreme Court issued an opinion in this case holding for the first time that an employer facing a disparate impact claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and defending on the basis of reasonable factors other than age ("RFOA") under § 623(f)(1), "must not only produce evidence raising the defense, but also persuade the factfinder of its merit." *Meacham v. KAPL, Inc.*, 128 S. Ct. 2395, 2398 (2008).

The Supreme Court thus resolved a conflict that existed at the time of the trial inthis case over who bears the burden of proving RFOA. Compare *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1415-16 (11th Cir. 1986) ("[w]e have repeatedly held that the plaintiff bears the burden of persuasion on

the RFOA defense"), *cert. denied*, 479 U.S. 1090 (1987), and *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 590-91 (5th Cir. 1978), with *Criswell v. Western Airlines*, 709 F.2d 544 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985). Because this Court held in "*Meacham II*," 461 F.3d 134, 141 (2d Cir. 2006), that "plaintiff bears the burden of persuading the factfinder that the employer's justification is unreasonable," the judgment entered in favor of the defendants in *Meacham II* has been vacated and the case remanded back to this Court for further consideration.

This letter brief is submitted on behalf of the defendants, KAPL, Inc., Lockheed Martin Corporation, and John J. Freeh, in response to this Court's July 3, 2008 Order, in which the parties were directed to brief these four questions:

(1) in view of the Supreme Court's opinion vacating this Court's judgment, how should this Court proceed on remand?

(2) should defendants prevail as a matter of law on their RFOA defense?

(3) did the employer waive the affirmative defense of a reasonable factor other than age by not requesting a jury charge on that defense and/or not objecting to the trial court's jury charge in this regard? and,

(4) is a new trial required?

Defendants' answers to each of these questions are provided below.

On the first question, applying the law recently articulated by the Supreme Court to the facts of this case, this Court should again grant defendants'

motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50, and dismiss the plaintiffs' disparate impact claims in their entirety based on the unimpeached and uncontested evidence of reasonableness introduced at trial by defendants. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000). Indeed, as the Supreme Court recently observed, it has already been decided by this Court, as a matter of law, that although "[t]here may have been other reasonable ways for [defendants] to achieve [their] goals . . . , the one selected was not unreasonable." *Meacham*, 128 S.Ct. at 2399 n.6 (internal quotes omitted). Thus, as Justice Souter wrote, this Court in *Meacham II* "showed no hesitation in finding that [defendants] prevailed on the RFOA defense, though the court expressed its conclusion in terms of [plaintiffs'] failure to meet the burden of persuasion." *Id.* at 2406.

Defendants' RFOA evidence, as discussed below, not only satisfied their burden of production, but also their burden of persuasion, as a matter of law. In fact, plaintiffs conceded both at trial and previously on appeal to this Court that the factors relied upon by defendants "were reasonable, provided they were not influenced by a subconscious age bias." Plaintiffs' prior Brief on Remand, p. 11. The jury found there was insufficient proof of any such bias or motivation, however, and defendants have consistently argued that they are entitled to judgment as a matter of law on plaintiffs' disparate impact claims, pursuant to Rule 50. *See*, e.g., ETT 4413-28.[1] This Court should

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[1] Pages of the transcript in Exhibit Trial Transcript Volumes I to XII are designated "ETT-[page number]." Exhibits

therefore not hesitate to find on remand that defendants satisfied their burden of persuasion on their RFOA defense by proving at trial that the factors they used were reasonable, as a matter of law. *See Smith v. City of Jackson*, 544 U.S. 228 (2005) ("*City of Jackson*").

On the second question, "[t]he focus of the [RFOA] defense is that the factor relied upon was a 'reasonable' one for the employer to be using." *Meacham*, 128 S. Ct. at 2403. And, "the more plainly reasonable the employer's 'factor other than age' is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious." *Id.* at 2406. This is just such a "short-step" case because the non-age factors used by defendants were not only "objective standards," as the trial court found (*Meacham*, 185 F. Supp. 2d 193, 208 (N.D.N.Y. 2002)), but they were "plainly reasonable."

As correctly observed in Meacham II, defendants introduced uncontested evidence of reasonableness at trial in support of their RFOA defense. This evidence included the layoff matrices prepared for the plaintiffs (E-334-372), ranking plaintiffs in terms of their company service, job performance, criticality, and flexibility, and the testimony of managers who explained that KAPL decided to use these factors only after considering the best practices of other companies. ETT-340, 883-86, 1135, 1337, 1347-48, 4089, 4102-03. Defendants' proof of reasonableness also included the unimpeached testimony of expert

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in the Exhibit Volume to the Appendix are cited as "E [page number]."

Frank Landy, a "specialist in industrial psychology with substantial corporate downsizing experience," who "testified that the criteria of 'criticality' and 'flexibility' were ubiquitous components of 'systems for making personnel decisions,' and that the subjective components of the IRIF were appropriate because the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation." *Meacham II*, 461 F.3d at 144. In fact, Landy, never cross-examined by the plaintiffs, testified that the criteria used by defendants "form the core of most reasonable and effective systems" and he had not "seen any systems for making personnel decisions in the last couple decades that have not included those four things." ETT-4092-96, 4116.

As further explained in *Meacham II*, "KAPL's staffing manager testified to the importance of criticality and flexibility to ensuring that KAPL could carry on operations with a shrinking workforce." 461 F.3d at 144. The uncontested evidence thus proved that an employee's flexibility to perform tasks outside his/her existing roles was imperative. ETT-1023-24, 1403-04. The evidence likewise proved that criticality was a reasonable factor to use because KAPL needed to retain those employees who possessed unique knowledge and skills essential to its changing work. ETT-1023-24, 1134-35, 1404-05. Defendants also proved they "set standards for managers constructing matrices and selecting employees for layoff, and . . . did monitor the implementation of the IRIF," thereby "restrict[ing] arbitrary decision-making by individual managers." *Meacham II*, 461 F.3d at 145-46.

Defendants' proof of reasonableness thus demonstrated overwhelmingly "that the specific features of the IRIF challenged by plaintiffs were routinely-used components of personnel decision-making systems in general, and were appropriate to the circumstances that provoked KAPL's IRIF." *Id.* at 144. As noted in Meacham II, plaintiffs "did not directly challenge the testimony of KAPL principals regarding the planning and execution of the [RIF]," leaving the defendants' proof of reasonableness uncontested at trial. *Id.* at 145. The entire record in this case thus "raise[s] no close question as to the reasonableness" of the non-age factors used by the employer, just as in City of Jackson. *Id.* at 141.

As a result, this Court should again grant judgment in favor of defendants, as a matter of law, taking into account both (1) "the distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age;" and (2) the fact that "it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group," as the Supreme Court has itself emphasized. *Meacham*, 128 S. Ct. at 2406.

On the third question, the defendants have not waived their RFOA defense and "have not waived their argument that their business justification was 'reasonable.'" *Meacham II*, 461 F.3d at 146 n.9. That is because the Supreme Court's recent decision in this case is the first time that the Court has squarely held that RFOA is an affirmative defense on which employers have the burden of persuasion. *See Meacham*, 128 S. Ct. at 2400 (noting that this issue

was not "wellposed" in *Western Air Lines, Inc. v. Criswell*, 472 U.S. at 408 n.10)). The Second Circuit also never squarely decided or addressed this issue until *Meacham II*, but, in *EEOC v. Johnson & Higgins*, 91 F.3d 1529, 1541 (2d Cir. 1996), cert. denied, 479 U.S. 1090 (1987), this Court described RFOA merely as "a defense" and cited *Iervolino*, *supra*, with approval. *See* 796 F.2d at 1415, 1419.

At the time of the trial in this case, the parties and the District Court, like this Court in "*Meacham I*," 381 F.3d 56 (2d Cir. 2004), considered themselves bound by the burdens of proof and production established in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and in *Smith v. Xerox*, 196 F.3d 358 (2d Cir. 1999). Defendants' proposed instruction (*see* Defendants' Requested Instr. No. 21) was consistent with these settled precedents, as was the instruction given to the jury by the trial judge. *See Meacham II*, 461 F.3d at 148 (Judge Pooler, dissenting); and Plaintiffs' prior Brief on Remand, p. 8. Plaintiffs, who initially asked the trial judge to impose the burden of proving "business necessity" on the defendants (*see* Plaintiffs' Proposed Request No. 29), never objected to this instruction. It is they who have thus waived any objection to the charge. *See Pulliam v. Tallapoosa County Jail*, 185 F.3d 1182, 1188 (11th Cir. 1999).

Furthermore, defendants specifically included an RFOA "defense" in their Answer (*see* Answer, Second Defense, p. 11), and created a substantial trial record on this issue to meet what everyone agreed was their burden of production. The legitimacy and reasonableness of the non-age selection criteria used by defendants were also argued in summation to the

jury by defense counsel (*see* TR 4555-4563). Plaintiffs were thus given "notice of the [defense] and a chance to argue, if [they could], why the [defense] would be inappropriate," but they never did so. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971).

Notably, the jury here was also instructed, *inter alia*, that (a) plaintiffs alleged "that the practices by which they were selected for termination . . ., **while fair on their face**, were discriminatory in operation" (ETT 4731); and (b) **"[t]he defendants assert[ed] that factors other than the ages of the plaintiffs . . . account[ed] for any statistical deviations . . . [and] [t]hese factors include . . . the education, work performance, skills, flexibility and criticality of the plaintiffs as compared to other similarly situated employees"** (ETT 4733-34) (emphasis added). The reasonableness of defendants' "factors other than age" was simply never questioned at trial by the plaintiffs. Instead, plaintiffs argued "that some of these factors . . . were themselves influenced by the ages of the plaintiffs" (TR 4734), an intentional discrimination argument completely rejected by the jury.

Under all of these circumstances, defendants have not waived RFOA as an affirmative defense. Indeed, this Court has held that a "defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority" and, when "a supervening [Supreme Court] decision alters settled law," a defendant "cannot be said to have 'forfeited a right' by not making an objection, since at the time of trial no legal right existed." *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994). *See also*

Johnson v. Zerbst, 304 U.S. 458, 464 (1938)("a waiver is the intentional relinquishment of a known right"); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967); *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981); *Paese v. Hartford Life & Accident Ins. Co.*, 449 F.3d 435, 447 n.4 (2d Cir. 2006); *EEOC v. Dinuba Med. Clinic*, 222 F.3d 580, 586 (9th Cir. 2000). In any event, this Court "retains broad discretion to consider issues not raised initially in the District Court," particularly where, as here, the only issue is purely legal and there is no need for additional fact-finding, and where it would be manifestly unjust not to do so. *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000). *See also Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976).

Finally, on the fourth and last question, defendants submit that no new trial is required here because the parties were fully heard on this issue at trial, no additional fact finding is needed, and "there is no sufficient evidentiary basis for a reasonable jury to find for" plaintiffs on the reasonableness of the defendants' "factors other than age." *Reeves*, 530 U.S. at 149 (citing Rule 50(a)(1)).

Respectfully submitted,

NIXON PEABODY LLP

By: /s/ _____

John E. Higgins

Margaret A. Clemens

Attorneys for defendants-appellants

KAPL, Inc., Lockheed Martin, and John J. Freeh

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LETTER BRIEF

August 4, 2008

Catherine O'Hagan Wolfe, Clerk of the Court

United States Court of Appeals for the Second Circuit

Daniel Patrick Moynihan U.S. Court House

500 Pearl Street, Room 370

New York, NY 10007

Re: Meacham, et al. v. KAPL, Inc.,et al.; Docket No.: 02-7378

Dear Ms. Wolfe:

This letter brief is submitted on behalf of the 17 plaintiffs-appellees pursuant to the Court's July 3, 2008 Order which directs the parties to address the following four questions.

I. How Should the Court Proceed on Remand?

This Court should affirm the district court's denial of defendants' Rule 50(b) motion; reinstate the third amended judgment with interest; and remand for a determination of plaintiffs' costs, expenses, and legal fees. Defendants waived their RFOA defense by abandoning it, and can present no basis for excusing that waiver. If the Court nonetheless concludes that defendants are entitled to assert their RFOA defense now, notwithstanding their failure to press it at trial, the Court should remand the case to the district court for a review of the sufficiency of the evidence in the first instance. That court can exercise its discretion

under Rule 50(b) to decide whether to: (1) allow judgment on the verdict; (2) order a new trial on liability; or (3) direct the entry of judgment as a matter of law ("JMOL").[1] If this Court undertakes a review of the evidence, it should find that defendants failed to meet their heavy burden of showing that a rational jury would have been compelled to accept the RFOA defense, had it been pursued at trial.

II. Did Defendants Waive the RFOA Affirmative Defense?

1. Yes. Given the Supreme Court's holding that the RFOA provision is an affirmative defense, defendants had the burden of pleading, pressing, and proving the defense at trial. *See, e.g., McCardle v. Haddad*, 131 F.3d 43, 51-52 (2d Cir. 1997). Raising the defense in their answer is not enough; the failure to press it in pretrial submissions or in the jury instructions constitutes an abandonment and waiver of the defense. *See Blissett v. Coughlin*, 66 F.3d 531, 538-539 (2d Cir. 1995); *see also Sales v. Grant*, 224 F.3d 293, 296 (4th Cir. 2000); *Violette v. Smith & Nephew Dyonics, Inc.*, 62 F.3d 8, 11 (1st Cir. 1995); *Walsh v. Mellas*, 837 F.2d 789, 799-800 (7th Cir. 1988); *Heiar v. Crawford County*, 746 F.2d 1190, 1196-1197 (7th Cir. 1984). Whether the abandonment

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[1] Nothing in the Supreme Court's mandate, remanding this case for "further proceedings consistent with [the Court's] opinion," slip op. 17, precludes consideration of whether defendants waived their RFOA defense or whether a remand to the district court for its consideration under Rule 50(b) would be appropriate. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 348 n.18 (1979); *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 208-209 (1st Cir. 1997).

"was a matter of strategy or mere inadvertence is of no consequence." *Blissett*, 66 F.3d at 539.

In this case, defendants pled the RFOA affirmative defense in their answer, (A-139), but abandoned it before trial. They never raised the RFOA defense in their Rule 56 motion for summary judgment, at the pretrial conference, or in their requested jury instructions, and did not object when an RFOA instruction was not given. Their proposed jury instructions never mentioned the RFOA defense, (Docket # 67, *see* Requested Instruction No. 38), nor did defendants seek JMOL on the basis of the RFOA defense in their Rule 50 motions.

Any one of these failures would be enough to preclude defendants from raising the RFOA defense for the first time on appeal. *See, e.g., Zellner v. Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007) (failure to request jury instruction); *United States v. Walsh*, 700 F.2d 846, 855-856 (2d Cir. 1983) (failure to request or object to instructions); *United States v. Young*, 745 F.2d 733, 752 (2d Cir. 1984) (proposal of erroneous instruction); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 164 (2d Cir. 1998) (failure to raise issue in Rule 50 motions).[2] Taken together, they constitute an unequivocal waiver of the affirmative defense. *See, e.g., McCardle*, 131 F.3d at 52; *Blissett*, 66 F.3d at 539; *Heiar*, 746 F.2d at 1196-1197.

2. The general waiver rule is subject to a narrow exception for "defenses which were not known to be

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[2] In fact, defendants' failure to raise the RFOA defense in their Rule 50 motions absolutely "deprives the appellate court of the power to order entry of judgment in favor of that party." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-401 (2006) (citation omitted).

available at the time they could first have been made." *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981).[3] The defaulting defendant must show that "(i) at the time of the procedural default, a prior authoritative decision indicated that the defense was unavailable, and (ii) the defense became available thereafter by way of supervening authority (say, by overruling of the prior decision or legislative clarification)." *Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004). Thus, the exception applies "only when the defense, if timely asserted, would have been futile under binding precedent." *Id.* (citing *Holzsager*, 646 F.2d at 794-796). *See also, e.g., Jackson v. Seaboard Coast Line RR, Co.*, 678 F.2d 992, 1012-1013 (11th Cir. 1982).

a. In this case, nothing prevented defendants from asserting the RFOA defense at trial. As the Supreme Court noted, after "looking at the statutory text, most lawyers would accept . . . as a matter of course" that the RFOA provision establishes an

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[3] Defendants argued in the Supreme Court that they were entitled to assert the RFOA defense because it was "plain error" for the trial court not to give an RFOA instruction. That is wrong. First, defendants do not challenge the jury instructions – a claim that would entitle them to, at most, a new trial, *see, e.g., Norfolk S. Ry. Co. v. Sorrell*, 127 S. Ct. 799, 809 (2007) – but rather the jury's verdict. Defendants cannot claim that the jury plainly erred in failing to award judgment on the basis of an abandoned defense. Second, even if defendants claimed error in the jury instructions, it is never error, much less plain error, to decline to instruct a jury on a defense affirmatively abandoned. *Cf. United States v. Yu-Leung*, 51 F.3d 1116, 1121-1122 (2d. Cir. 1995). Finally, plain error review is unavailable where, as here, the defendant invites the error by proposing the erroneous instruction. *See United States v. Young*, 745 F.2d at 752; *United States v. Quinones*, 511 F.3d 289, 321 (2d Cir. 2007).

affirmative defense. 128 S.Ct. at 2400. This includes defendants' lawyers, who specifically pled RFOA as an affirmative defense. (A-139).

While this Court reached a contrary conclusion, it did so principally on the basis of language in *Smith v. City of Jackson*, which was decided long after defendants abandoned their RFOA defense. *See* 461 F.3d at 141-142. Prior to the confusing language in *City of Jackson*, there was no basis (much less binding authority) for construing the RFOA provision as anything but an affirmative defense. At the time of trial, the only on-point decisions indicated that RFOA was an affirmative defense. *See Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 546, 552-553 (9th Cir. 1983); *see also Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (6th Cir. 1975) (stating same in dicta).

b. Nothing in *Smith v. Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999), is to the contrary. There, this Court made clear that it was addressing a narrow question regarding "the appropriate use of statistics . . . , particularly with respect to the disparate impact claim." *Id.* at 364. In an introductory section, the Court included dicta describing its understanding of what the plaintiff must prove to establish an ADEA disparate impact violation. *Id.* at 364-365.[4] The Court said nothing about what affirmative defenses an employer might raise if the plaintiff meets her burden. It did not, for example, mention the BFOQ defense, but no one would read that failure to preclude employers from asserting that defense. Likewise, the opinion's failure to mention the RFOA

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[4] The Supreme Court's recent decision makes clear that *Xerox* placed too great a burden on plaintiffs, but that provides no excuse for defendants' failure to press RFOA at trial.

defense did not preclude defendants from asserting it in this case.

If anything, the opinion suggested that the defense remained available. After the Court noted that it ordinarily applies the disparate impact standard of Title VII in ADEA cases, it stated that "a different analysis may apply to claims brought under the ADEA under some circumstances, because age tends to be highly correlated to certain factors an employer is permitted to consider." *Id.* at 367 n.5. The reference to such reasonable "factors" other than age thus signaled that the RFOA provision would be available to defend against a disparate impact claim. The Court also made clear that it was the defendant's obligation to raise the defense – it declined to consider the defense in *Xerox* because the employer did not "purport to have relied on any such factors." *Id.*

c. Nor did anything in the EEOC regulations excuse defendants' waiver. First, although the regulation may have misstated the test for proving the RFOA defense, it said nothing to relieve defendants of the obligation to raise and prove it at trial. To the contrary, if anything, the regulations indicated that the RFOA provision was an affirmative defense. *See* 28 C.F.R. § 1625.7(e); *Meacham*, 128 S.Ct. at 2407 (Scalia, J., concurring in the judgment). Second, plaintiffs are unaware of any authority holding that an agency interpretive regulation can provide the "strong precedent," *Curtis Publishing Co.*, 388 U.S. at 143, or "authoritative decision," *Bennett*, 362 F.3d at 7, required to excuse a defendant from raising an affirmative defense. Indeed, in this case, defendants argued that the

regulations "lack the force and effect of law," and therefore if "entitled to any deference at all, it is at most the 'respect' accorded under *Skidmore*." Def. S.Ct. Br. 41 (citation and quotation marks omitted). Defendants thus plainly did not believe that any binding authority precluded them from raising arguments in conflict with the regulations. Indeed, they insisted that the regulations were invalid in their entirety because they recognized a disparate impact cause of action. *See*, Def. Rep.Br. 13-14 (filed with this Court on February 18, 2003). Any assertion of reliance now is simply a post-hoc invention. *See* Def. Proposed Requests to Charge, Docket # 67 (citing various authorities but not EEOC regulations).

3. To the extent defendants' waiver might nonetheless be excused in the case of a "fundamental error" that "goes to the very integrity of the trial," *Meacham*, 461 F.3d at 152 (Pooler, J., dissenting) (citations omitted), they can make no such showing here. *See id.* at 152-153. To the contrary, it would be manifest injustice to allow defendants to withhold a defense from the jury, deprive plaintiffs of any incentive or opportunity to address it, and then seek JMOL for the first time on appeal on the basis of a defense they never presented at trial.

III. Should KAPL Prevail as a Matter of Law on its RFOA Defense?

1. No. If the Court excuses defendants' waiver, it should remand the case to the district court to review the sufficiency of the evidence. The trial court, which heard the evidence, is better positioned to evaluate it in the first instance. Moreover, that court is particularly well-suited to decide whether a new trial on liability would be the appropriate remedy for any

insufficiency in the evidence relating to the RFOA defense defendants abandoned. *See* Fed.R.Civ.P. 50(b); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 (2006) ("[D]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart."). *See also id.* at 402 (suggesting Seventh Amendment problems would be raised by appellate review of a sufficiency-of-the-evidence argument not ruled upon by trial court).

2. If this Court undertakes a review of the evidence, it should affirm. Even under ordinary standards of appellate review, JMOL on the basis of an affirmative defense is "rare." *Granite Computer Leasing Corp. v. Travelers Indem. Co.*, 894 F.2d 547, 551 (2d Cir. 1990). "A verdict should be directed in such instances only if the evidence in favor of the movant is so overwhelming that the jury could rationally reach no other result." *Id.* at 551; *see also, Fairbrother v. Morrison*, 412 F.3d 39, 53 (2d Cir. 2005); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 109 (2d Cir. 2001); *Broadnax*, 415 F.3d at 270; *EEOC v. Delaware DHSS*, 865 F.2d 1408, 1414 (3d Cir. 1989). Moreover, because defendants did not preserve the RFOA defense below, they must satisfy an even greater burden. *See Shade v. Housing Auth.*, 251 F.3d 307, 313 (2d Cir. 2001) (a "fundamental error" must be "even more egregious than the type of 'plain errors' that might suffice to excuse a procedural default in a criminal trial"); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 164 (2d Cir. 1998)

(failure to raise claim in Rule 50 motion requires proof of "manifest injustice").[5]

While it may be true that a system in which termination decisions "made by managers who are in day-to-day supervisory relationships with their employees . . . advances business objectives that will usually be reasonable," *Meacham*, 461 F.3d at 146 (emphasis added), in this case a rational jury could have found that unusual factors rendered defendants' action unreasonable. First, although aware of the risk that unconstrained managerial discretion could be used to give effect to overt or subconscious bias, and faced with strong statistical evidence suggesting that bias had infected the IRIF, defendants failed to implement the basic procedural protections they themselves had determined reasonable and necessary to protect against age discrimination. Although defendants' own plan called on managers to check for evidence of bias through a disparate impact analysis, managers did not do so, and the analysis conducted by a single, untrained human resources employee was worthless. *Id.* at 144-145. The review board charged with ensuring compliance with the IRIF plan did nothing to correct this. *Id.* at 145. Moreover, the board did not receive any training on the ADEA, and made no attempt to monitor for age discrimination at all. *Id.* And although aware of the "startlingly skewed

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[5] This Court's precedent excusing failures to preserve issues through Rule 50 motions in cases of "manifest injustice," is incompatible with the Supreme Court's recent decision in *Unitherm*, which describes Rule 50's requirement in jurisdictional and constitutional terms. *See* 546 U.S. at 400-402. Thus, defendants' failure to raise RFOA in their Rule 50 motions is an absolute bar to JMOL on appeal.

results" of the front-line managers' discretionary decisions, and charged with ensuring compliance with the ADEA, defendants' general counsel did little to review the decision-making for bias. *Id.*

Second, beyond not adhering to their own procedures, "KAPL could have designed an IRIF with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias." *Meacham*, 381 F.3d. at 75. In addition, the jury could have found that the plan failed to protect against managerial bias through even the most rudimentary protection of ADEA-compliance training for the front-line managers charged with making the critical, subjective evaluations. *Meacham*, 461 F.3d at 145.

Thus, the jury reasonably could have accepted plaintiffs' expert testimony that the process "did not offer adequate protections to keep the prejudices of managers from influencing the outcome." *Id.* While defendants' expert offered contrary testimony, the weight and credibility of the competing expert testimony is a question solely for the jury. *Granite Computer*, 894 F.2d at 551.

It is thus unsurprising that this Court concluded that a "reasonable jury could have found that KAPL management's failure to challenge [the] patently inadequate approach evinced a desire not to know that the overwhelming-and overwhelmingly disparate-impact of the IRIF was on older workers, and that KAPL's failure to modify its procedures in the face of this disparity reflected a reckless disregard for whether it had violated the ADEA by implementing a policy with such an impact." *Meacham*, 381 F.3d. at 77.

IV. Is a New Trial Required?

No. As described above, this Court can and should affirm the denial of defendants' Rule 50(b) motion. If, however, the Court disagrees, the proper remedy is a remand to the district court for a review of the sufficiency of the evidence in the first instance, and to allow that court to exercise its discretion under Rule 50(b) to: (1) allow judgment on the verdict; (2) order a new trial on liability; or (3) direct the entry of JMOL. If the Court does not remand, it should order a new trial on liability to remedy any insufficiency in the evidence. When courts excuse the failure to raise an affirmative defense, the appropriate remedy is to provide a new trial at which the defense may be aired, not to allow the defendant to bypass the jury, and seek judgment on the basis of a record not developed to address the defense. *See, e.g., Armstrong ex rel. Armstrong v. Brookdale Univ. Hosp.*, 425 F.3d 126, 136 (2d Cir. 2005); *Baskin v. Hawley*, 807 F.2d 1120, 1134 (2d Cir. 1986). In this case, the reasonableness of defendants' conduct had no legal relevance under the jury instructions defendants themselves proposed, and the court adopted. It should come as no surprise, therefore, that plaintiffs did not cross-examine defendants' expert testimony relating to the IRIF procedure or explore the "reasonableness" issue through their own witnesses. Given the Supreme Court's decision in *Unitherm*, this Court cannot award JMOL on the basis of a defense defendants never raised in their Rule 50 motions, nor presented to the jury, and plaintiffs never had a fair opportunity to rebut. *See* 546 U.S. at 400-402.

Very truly yours,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 17th day of February, two thousand ten.

CLIFFORD B. MEACHAM, individually and on behalf of all other persons similarly situated, THEDRICK L. EIGHMIE, individually and on behalf of all other persons similarly situated, ALLEN G. SWEET, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, RONALD G. BUTLER SR., WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSEN, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, MARGARET REYNHEER, JOHN K. STANNARD, DAVID W. TOWNSEND, CARL T. WOODMAN,

Consolidated-Plaintiffs-Appellees,

HILDRETH E. SIMMONS JR., HENRY BIELAWSKI, JAMES S. CHAMBERS, ARTHUR J. KASZUBSKI, DAVID J. KOPMEYER, CHRISTINE A. PALMER, FRANK A. PAXTON, JANICE M.

POLSINELLE, TEOFILS F. TURLAIS, BRUCE E. VEDDER,

Consolidated-Plaintiffs,

v.

KNOLLS ATOMIC POWER LABORATORY, also known as KAPL, Inc., LOCKHEED MARTIN, INC., JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Defendants-Appellants.

Docket No. 09-2037-cv

Clifford Meacham, Thedrick Eighmie, and Allen Sweet having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined that the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of February, two thousand ten.

CLIFFORD B. MEACHAM, individually and on behalf of all other persons similarly situated, THEDRICK L. EIGHMIE, individually and on behalf of all other persons similarly situated, ALLEN G. SWEET, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, RONALD G. BUTLER SR., WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSEN, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, MARGARET REYNHEER, JOHN K. STANNARD, DAVID W. TOWNSEND, CARL T. WOODMAN,

Consolidated-Plaintiffs-Appellees,

HILDRETH E. SIMMONS JR., HENRY BIELAWSKI, JAMES S. CHAMBERS, ARTHUR J. KASZUBSKI, DAVID J. KOPMEYER, CHRISTINE A. PALMER, FRANK A. PAXTON, JANICE M.

POLSINELLE, TEOFILS F. TURLAIS, BRUCE E. VEDDER,

Consolidated-Plaintiffs,

v.

KNOLLS ATOMIC POWER LABORATORY, also known as KAPL, Inc., LOCKHEED MARTIN, INC., JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Defendants-Appellants.

Docket No. 09-2037-cv

Knolls Atomic Power Laboratory, Lockheed Martin, Inc., and John Freeh having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined that the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK